2007
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No.

IN THE

Supreme Court of the United States

MOISES LOPEZ,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL BELEW
Counsel of Record
BELEW, GONZALEZ,
SINGLETON & BELEW
1024 North Main Street
Fort Worth, TX 76164-9319
(817) 336-7575

QUESTION PRESENTED

I. **DOES A DISTRICT COURT'S USE OF FACTUAL FINDINGS BEYOND THOSE FACTS FOUND BY A JURY OR ADMITTED BY DEFENDANT CONSTITUTE A VIOLATION OF DEFENDANTS' RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THOSE FINDINGS BLUR THE LINE BETWEEN ELEMENTS OF THE OFFENSE AND ENHANCEMENTS AND NECESSARILY CHANGED THE PUNISHMENT THAT WOULD BE ASSESSED BY THE JUDGE?**

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United State Supreme Court Cases:

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OPINIONS BELOW

The decision of the Fifth Circuit is not reported but is available at 2007 WL 509402 and in Appendix II. The District Court's decision is unreported, but its Judgement is attached as Appendix I.

JURISDICTION

The District Court had jurisdiction over this matter pursuant to 18 U.S.C, § 3231. The Firth Circuit Court of Appeals exercised jurisdiction under 28 U.S.C. § 1291. The case was heard by Jones, Chief Judge, and Jolly and Owen, Circuit Judges. The Judgment of the Court of Appeals was entered on February 14, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Constitution:

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Statutes:

21 U.S.C. § 841

(See Appendix VII – Statutes).

U.S. Sentencing Guidelines:

United States Sentencing Commission, *Guidelines Manual*, § 2D1.1

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

. . .

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) M 30 KG or more of Heroin;	Level 38
M 150 KG or more of Cocaine;	
M 1.5 KG or more of Cocaine Base;	
M 30 KG or more of PCP, or 3 KG or more of PCP (actual);	
M 15 KG or more of Methamphetamine, or 1.5 KG or more of	
Methamphetamine (actual), or 1.5 KG or more of "Ice";	
M 15 KG or more of Amphetamine, or 1.5 KG or more of	
Amphetamine (actual);	
M 300 G or more of LSD;	
M 12 KG or more of Fentanyl;	
M 3 KG or more of a Fentanyl Analogue;	
M 30,000 KG or more of Marihuana;	
M 6,000 KG or more of Hashish;	
M 600 KG or more of Hashish Oil;	
M 30,000,000 units or more of Schedule I or II Depressants;	
M 1,875,000 units or more of Flunitrazepam.	

. . .

(5) M At least 700 G but less than 1 KG of Heroin; Level 30
M At least 3.5 KG but less than 5 KG of Cocaine;
M At least 35 G but less than 50 G of Cocaine Base;
M At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G
of PCP (actual);
M At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but
less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50
G of "Ice";
M At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less
than 50 G of Amphetamine (actual);
M At least 7 G but less than 10 G of LSD;
M At least 280 G but less than 400 G of Fentanyl;
M At least 70 G but less than 100 G of a Fentanyl Analogue;
M At least 700 KG but less than 1,000 KG of Marihuana;
M At least 140 KG but less than 200 KG of Hashish;
M At least 14 KG but less than 20 KG of Hashish Oil;
M At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
M At least 43,750 but less than 62,500 units of Flunitrazepam.

United States Sentencing Commission, *Guidelines Manual*, § 3B1.1

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

State Statutes:

TEX. HEALTH & SAFETY CODE ANN. § 481.112

§ 481.112. OFFENSE: MANUFACTURE OR DELIVERY OF SUBSTANCE IN PENALTY GROUP 1.
(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants,

four grams or more but less than 200 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TEX. HEALTH & SAFETY CODE ANN. § 481.115

§ 481.115. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 1.

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or

more but less than four grams.

(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.

(e) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TEX. HEALTH & SAFETY CODE ANN. § 481.117

§ 481.117. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 3.

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a Class A misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than 28 grams.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by

aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams.

(d) An offense under Subsection (a) is a felony of the second degree, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed $50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TEX. HEALTH & SAFETY CODE ANN. § 481.121

§ 481.121. OFFENSE: POSSESSION OF MARIHUANA.

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) is:

(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;

(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;

(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;

(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;

(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and

(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

STATEMENT OF THE CASE

A. Factual Background:

On July 17, 2003 Dallas narcotics officers observed Petitioner-Defendant (Hereinafter "Defendant") and Rodrigo Navarro moving a gallon sized bag between a Cadillac Escalade and a black Hummer. The Defendant, Navarro, and a third person left the vehicles and entered a bus station, and Defendant returned minutes later. As he was walking towards the Hummer officers approached him, and began questioning him. The officers observed the gallon-size bag containing a white crystalline substance in the passenger floorboard of the Hummer. The contents of the bag were submitted for analysis and it was determined that the contents consisted of 455 grams of 41 % pure methamphetamine.[1] *See, Factual Resume, Appendix III -2 ¶ 2.*

A complaint was filed in the United States District Court for the Northern District of Texas against the Defendant and on March 2, 2005 a grand jury returned a six-count indictment against Defendant. *See, Indictment, Appendix IV.*

B. Proceedings Below:

On or about July 17, 2003 Defendant was arrested by Dallas narcotics officers when they discovered a gallon-size bag that contained 455 grams of methamphetamine in a vehicle. On January 28, 2005 a complaint was filed in the United States District Court for

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[1] Under the Sentencing Guidelines "Ice" refers to a d-methamphetamine hydrochloride of at least 80% purity. United States Sentencing Commission, *Guidelines Manual*, §3D1.1, Notes to Drug Quantity Table, (C) (Nov. 2006).

the Northern District of Texas and on March 2, 2005 the grand jury returned a six-count indictment charging Defendant with conspiracy to possess with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S,C. §§ 841(b)(1)(A) and 846 (Count One); and possession of more than 50 grams of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (Count Three). On March 22, 2005, the Defendant appeared in court before Magistrate Paul Z. J. Stickney and entered a plea of not guilty to the charges.

On September 13, 2005, the Defendant entered into a plea agreement. *See, Plea Agreement, Appendix V.* Under the terms of that Agreement Defendant agreed to plead guilty to Count Three of the indictment and the government agreed to dismiss Count One. *See, Plea Agreement, Appendix V-1, ¶ 2;* Court's Judgment, Appendix I-1. The plea agreement was accompanied by a factual resume. *See, Factual Resume, Appendix III.*

On October 6, 2005, Defendant was rearraigned and entered a plea of guilty to Count Three of the indictment pursuant to the plea agreement. A Pre-Sentence Report was ordered.

Defendant pled guilty to possession of 455 grams of methamphetamine for which the United States Sentencing Guidelines (Hereinafter "Sentencing Guidelines") suggest a base offense level of 30, or 97-121 months. United States Sentencing Commission, *Guidelines Manual*, 2D1.1(c)(5) (Nov. 2006). The Pre-Sentence Report, however, suggested the drug amount to be 1.5 kilograms and the drug involved to be Ice, resulting in a base offense level of 38. *See, Pre-Sentence Report, Appendix VI-19.* The Pre-Sentencing Report increased Defendant's offense level by 2 points pursuant to U.S.S.G. § 3B1.1(c), finding that the Defendant was a

leader/organizer, due to information that he used runners in his drug business resulting in a total offense level of 40 or 292 to 365 months imprisonment. *See, Pre-Sentence Report, Appendix VI-19.*

A sentencing hearing was held on April 6, 2006 during which Defendant contested the claim that the drug involved was Ice and the allegation that he was an organizer/leader. The Court found the base offense level to be 38, plus an additional two-level increase for his role in the offense for a final offense level of 40. Based upon that offense level and a criminal history Category I, the Court applied a Sentencing Guideline range of 292 to 365 months and sentenced Defendant to a term of incarceration of 292 months to be followed by a five-year term of supervised release. *District Court Judgment, Appendix I-1.* Judgment was entered on April 12, 2006. *District Court Judgment, Appendix I.* A timely notice of appeal was filed on April 11, 2006. On February 14, 2007 the Court of Appeals for the Fifth Circuit issued an unpublished opinion pursuant to 5th Cir. R. 47.5 denying Defendant's appeal. This Application for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S USE OF FACTUAL FINDINGS BEYOND THOSE FACTS FOUND BY A JURY OR ADMITTED BY DEFENDANT CONSTITUTED A VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THOSE FINDINGS BLUR THE LINE BETWEEN ELEMENTS OF THE OFFENSE AND ENHANCEMENTS AND NECESSARILY CHANGED THE PUNISHMENT THAT WOULD BE ASSESSED BY THE JUDGE.

A. The United States Constitution Guarantees Defendants The Right To Have The Conduct With Which They Are Charged And For Which They Are To Be Sentenced To Be Found By A Jury.

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONT. amend. 6. The United States Constitution guarantees each defendant a right to know the charges he is facing, a right to

have those allegations tried before a jury and a right to be free from punishment until such time as a jury determines beyond a reasonable doubt that the defendant is in fact guilty of the conduct with which he is charged. *See,* U.S. CONST. amends. V, VI; *Bell v. Wolfish*, 441 U.S. 520, 535-536 (1979).

B. Determinate Sentencing Schemes Substantially Diminish Those Rights.

In 1984, however, Congress passed the Sentencing Reform Act of 1984. That Act set up a system under which district judges were not only allowed, but *required* to punish defendants based upon conduct that was not necessarily charged nor admitted or proved beyond a reasonable doubt. More specifically, the guidelines allowed the enhancement of a defendant's sentence based on factors not alleged in an indictment, but determined by a judge after trial and established only by a preponderance of the evidence. This system raised a number of common sense and constitutional problems.

C. This Court's Decisions In *Apprendi*, *Blakely* And *Booker* Recognized The Conflict Created By The Sentencing Guidelines.

In 2000 this Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 469-470 (2006). In *Apprendi*, the parties entered into a plea agreement, pursuant to which Apprendi pled guilty to two second-degree felonies and one third-degree offense. *Apprendi v. New Jersey*, 530 U.S. 466, 469-470 (2006). The judge, however, after a sentencing hearing entered a finding that the crime was motivated by racial bias, which resulted in a significantly greater sentence. *Apprendi*, 530 U.S. at 471. The Court of Appeals rejected Apprendi's Due Process claim finding that racial bias was a

"sentencing factor," rather than an element of offense. *Id.* The court, citing Oliver Wendell Holmes, observed that the law threatens certain consequences when people engage in enumerated acts. *Apprendi*, 530 U.S. at 476. When certain acts result in "punishment," it matters little if the act is called a crime or a "sentence enhancement." *Id.* The Court held that the rights to Due Process (in this case the 14th amendment) and trial by jury "indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 U.S. at 477. The Court went on to explain that:

> As we have, unanimously, explained, *Gaudin*, 515 U.S., at 510-511, 115 S. Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-541 (4th ed. 1873), trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . .' 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) (hereinafter Blackstone) (emphasis added). *See also Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Apprendi, 530 U.S. at 477. The Court stated that "other than the fact of a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at

490 (2000).

In 2004 this Court decided *Blakely v. Washington*, 542 U.S. 296. In *Blakely*, the defendant was sentenced to more than three years above the 53-month statutory maximum of the standard range because the judge found that he had acted with "deliberate cruelty." *Blakely*, 542 U.S. at 303. On appeal the Government contended that the maximum sentence was ten years, the maximum for class B felonies. *Id.* The Court, rejecting the State's contention, explained that:

> . . . the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *See Ring, supra*, at 602, 122 S. Ct. 2428 (''the maximum he would receive if punished according to the facts reflected in the jury verdict alone'' (*quoting Apprendi*, supra, at 483, 120 S. Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra*, at 488, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Blakely, 542 U.S. at 303-304.

In 2005 this Court addressed the U.S. Sentencing Guidelines in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the defendant was facing 210 to 262 months in prison based on the jury findings, but as a result of additional facts found by the judge, he was sentenced to 30 years. *Booker*, 543 U.S. at 220. In *Booker*, this

Court reaffirmed its prior decisions, but also noted that:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. *See Apprendi*, 530 U.S., at 481, 120 S. Ct. 2348; *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Booker, 543 U.S. at 233. Unfortunately (as with many rulings) the actual implementation of the truths recognized in the opinion has led to confusion and situations where Due Process and the right to a trial by jury can and are effectively denied.

D. The Implementation Of *Booker* Has Led To A Denial Of Defendants' Rights Under The Sixth And Fifth Amendments To The United States Constitution.

1. <u>The Instant Case Highlights the Potential Deprivation of Rights Routinely Created by Adherence To The Fifth Circuit's Implementation Of *Booker*.</u>

The current approach to sentencing under *Booker*, raises two important questions.

1. If a Court uses sentencing factors to substantially enhance a sentence and those factors are contested, does a Defendant have less of a right to Due Process and a jury merely because the judge did not have to follow mandatory guidelines?

2. When do sentencing factors cease to be advisory guidelines and become substantive elements?

a. When A Judge Makes Specific Findings That Were Hotly Contested, And These Findings In Turn Are Used To Substantially Enhance The Length Of A Defendant's Incarceration, Does A Defendant Have A Right To Have A Jury Decide These Contested Facts?

As already noted, this Court has previously, and correctly, reasoned that factual findings that alter the sentence a defendant is facing must be determined by a jury whether those factors are called elements or enhancements, and whether they are found in the statutes defining the charged crimes or whether they are found elsewhere in the statutes. *See, e.g., Apprendi*, 530 U.S. at 476. The instant case illustrates the problem under *Booker* in at least three ways.

First, factual findings entered by the Judge in the instant case served to alter the range of punishment Defendant was facing. Specifically, the Judge entered a finding that Defendant held a leader/organizer role. *See, Decision of Fifth Circuit Court of Appeals, Appendix II-2.* Defendant neither admitted to such a role nor was there a jury finding to support this finding. *See, Plea Agreement, Appendix V; Factual Resume, Appendix III.* Indeed, there was no testimony at the sentencing hearing regarding the Defendant's use of runners (the basis for the finding in the Pre-Sentence Report). Furthermore, this allegation was never alleged in the indictment. *See, Indictment, Appendix IV.* Nevertheless, the Judge made a finding that Defendant was a leader/organizer and as a result, Defendant was disqualified from the otherwise mandatory safety-valve provision. This in turn significantly altered the

sentencing range Defendant was facing – and it was done without an admission by Defendant or a finding by a jury.

Second, based only on the charged and admitted facts in this case, the Defendant would face a recommended sentence under the Sentencing Guidelines of 97 to 121 months. *See,* United States Sentencing Commission, *Guidelines Manual*, 2D1.1(c)(5) (Nov. 2006). The Court found a different drug, a different drug quantity and also entered the finding of leader/organizer, which resulted in a recommended sentence of 292 to 365 (base level of 38) under the Guidelines. *See,* United States Sentencing Commission, *Guidelines Manual*, 2D1.1(c)(1) (Nov. 2006). This is a substantial upward departure from the recommendation Defendant would have received based only on his admitted conduct. Nevertheless, the Court sentenced Defendant in accordance with the Sentencing Guidelines based on the Judge's findings. The Fifth Circuit's implementation of *Booker* creates two significant problems. First, the Court substantially departed from the sentence which would be recommended by the Sentencing Guidelines based solely on admitted conduct, but it was in no way obligated to explain this significant departure. But the Court did indicate its basis. As noted above, it denied the safety valve provision because the judge found by a preponderance that the Defendant was an organizer/leader as defined by the Guidelines. It also increased the severity of Defendant's sentence, not because of what Defendant admitted to, but because it found that Defendant was an organizer/leader, sold 1.5 kilograms of drugs, and dealt in Ice rather than methamphetamine. *See, Pre-Sentence Report, Appendix VI-19.* Each of these factual determinations was hotly contested and was the subject of a lengthy sentencing hearing. Finally, the Court's sentence followed precisely the Sentencing Guidelines – but again not the Guidelines for conduct Defendant which admitted, but the Guidelines applicable in light of

the court's factual determinations. Even disregarding the Sentencing Guidelines, when a court imposes a substantially higher sentence *because* of facts found only by a judge a defendant's right to have those contested facts determined by a jury is implicated. *See, e.g., Apprendi*, 530 U.S. at 490; *Blakely v. Washington*, 124 S. Ct. at 2537. When those factors are contested and are a factor in a substantial upward departure, the Fifth and Sixth amendments must apply.

b. When Do Sentencing Factors Cease To Be Advisory Guidelines And Become Substantive Elements?

Finally, some "punishment factors" push the fine line between elements of the offense and enhancement factors. For example, in Texas, as well as in many other states, the drug being possessed, sold or manufactured and the quantity of the drug involved directly determine the sentencing range a defendant is facing. For example, manufacture or delivery of more than 200 grams but less than 400 grams of heroin is a First Degree Felony (5 to 99 years or life); if the quantity is under one gram, the offense is a State Jail Felony (180 days to 2 years) and if the amount of heroin involved exceeds 400 grams the accused faces 15 years to 99 years or life in prison. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (2007). Similarly, possession of five grams of heroin would be a Second Degree Felony (2 to 20 years), while possession of the same amount of Lorazepam is a Class A misdemeanor (up to 1 year), and possession of the same amount of marijuana is a Class B Misdemeanor (up to 180 days in jail). *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115, 481.117, 481.121 (2007).

Such an approach is merely common sense. It is also the scheme

followed by the federal system with one minor variation – the schedules that assign different penalties for various drugs and the quantities of those drugs appear in the U.S. Sentencing Guidelines rather than in the statutes. Nevertheless, it is an exercise in fiction to imagine that any judge will impose the same sentence in a case involving 2 kilograms of methamphetamine and one involving 2 grams of methamphetamine; or in a case involving a pound of methamphetamine and one involving a pound of Ice or in a case involving a pound of marijuana.

Again, the instant case illustrates the problem. Defendant pled guilty to *455 grams* of *methamphetamine*, but the judge found him responsible for *1.5 kilograms* of *Ice*. *See, Plea Agreement, Appendix V; Factual Resume, Appendix III; District Court's Judgment, Appendix I.* Under the Sentencing Guidelines drug type and quantity are among the most significant factors in determining a defendant's sentence in drug cases. Even though the Guidelines are now officially advisory, the judge nevertheless inquired into drug type and quantity and sentenced Defendant based on his findings rather than Defendant's admissions. If the schedules regarding drug weight and type were found in a statute – even a statute that allowed a range of punishment – this type of sentencing would clearly be improper. Indeed, this Court has previously recognized that:

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to

> determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." J. Archbold, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. *See* 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, "the court must pronounce that judgment, which the law hath annexed to the crime."

Aprendi, at 478-479.

Thus we have a situation where a defendant pleads guilty to 455 grams and is sentenced for 1.5 kilograms; where he pled guilty to selling methamphetamine, and is sentenced for Ice. It is a situation where a Defendant pleads to one set of facts, and finds himself sentenced under a substantially different set of facts. Again, it is the height of fiction to believe that a sentencing judge would impose the same sentences for these offenses, and in this case the judge followed the Sentencing Guideline recommendation for 1.5 kilogram of Ice. These findings are precisely those that must be reserved exclusively to a jury.

2. **The Importance Of Having Juries Decide Jury Questions.**

There are at least three reasons to revisit *Booker*. First, the right to a jury determination of facts that will control the length of a person's sentence is a fundamental right that lies at the very heart of our criminal justice system. As this Court explained in *Blakely*:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Blakely, 524 U.S. at 305-306.

Second, when judges make determinations that substantially change the sentence a defendant can reasonably expect, this necessarily weakens the role of the jury. In *Booker*, Justice Stevens' concern that as sentencing enhancements found only by a judge by a preponderance of the evidence became greater, "the jury's finding of the underlying crime became less significant." *Id.* at 751. As a result the Sixth Amendment right to a jury trial is usurped. *Id.*

Third, and independently, the process introduces an element of uncertainty that necessarily undermines the entire criminal justice system. In 2002 this Court decided *Harris v. United States*, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). In *Harris* Justice Thomas, in a dissenting opinion, astutely observed that due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived, *Id.* at 2424 (Thomas, J., dissenting), *citing In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). He explained that society has long recognized a necessary link between punishment and crime. *Harris*, 122 S. Ct. at 2424 (Thomas, J., dissenting), *citing Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S. Ct. 2348 (2000) ("The defendant's ability to predict with certainty the judgment from the

face of the felony indictment flowed from the invariable linkage of punishment with crime"). He then asked the rhetorical question, "Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?" *Harris*, 122 S. Ct. at 2424 (Thomas, J., dissenting).

The current system, however, allows a person to be sentenced based on unindicted facts that can substantially alter the sentence imposed and allows a judge to change drug identities and quantities in a way that massively impacts that sentence that *will* be imposed. This eliminates the association of a penalty with a crime and in doing so undercuts the foundation of our criminal justice system.

CONCLUSION

Under the system currently in place following *Booker*, a Defendant is asked to plead guilty to specific charges (in this case, Count 3) in return for the agreed dismissal of other charges, but then faces sentencing not for the charges pled guilty to, but perhaps for dismissed charges or even conduct that has never been alleged in any indictment. Furthermore, the Defendant's sentence will be based not upon the conduct to which the defendant agreed to plead guilty, but to conduct which is not and cannot be known, and which (although it will determine the actual sentence imposed) need not be found true by a jury nor beyond a reasonable doubt. The Court must recognize a distinction between factors which aid a judge's exercise of discretion and factors that so significantly impact a defendant's sentence as to amount to the defendant being sentenced for a different charge. This problem is particularly apparent in drug cases where judges will impose sentences based on drug types and

quantities.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court issue a Writ of Certiorari in the instant case and for such further and other relief to which Petitioner may show himself to be entitled.

Respectfully submitted,

BY: Paul Belew

Paul Belew
Texas Bar No.: 00794926

BELEW, GONZALEZ, SINGLETON & BELEW
1024 North Main Street
Fort Worth, TX 76164-9319
(817) 336-7575
(817) 336-2597 Facsimile

ATTORNEY FOR PETITIONER
(DEFENDANT)

APPENDIX I

DISTRICT COURT'S JUDGMENT

UNITED STATES DISTRICT COURT

District of Texas - Dallas Division

UNITED STATES OF AMERICA

V.

MOISES LOPEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:05-CR-030-K (02)
USM Number: 32182-177
Luis A. Merren, Jr.
Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☒ pleaded guilty to count(s) count 3 of the indictment filed March 2, 2005 before a U.S. Magistrate Judge, which was accepted by the court.
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) & 841(b)(1)(A)	Possession of More Than 50 Grams of Methamphetamine with Intent to Distribute	July 17, 2003	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____
☒ Count(s) 1 of the indictment filed March 2, 2005 ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 6, 2006
Date of Imposition of Judgment
/s/
Ed Kinkeade, United States District Judge
Name and Title of Judge
April 7, 2006
Date

Certified a true copy of an instrument
on file in my office on , SEP 18 2006
Clerk, U.S. District Court,
Northern District of Texas
/s/ Deputy

DEFENDANT: MOISES LOPEZ
CASE NUMBER: 3:05-CR-030-K (02)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: two hundred ninety two (292) months.

☒ The court makes the following recommendations to the Bureau of Prisons:
Incarceration in the Dallas, Texas area and participation in the institutional 500 hour drug treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐before _____ on _____
☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

USCA5 110

DEFENDANT: MOISES LOPEZ
CASE NUMBER: 3:05-CR-030-K (02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: five (5) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender

registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any

controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MOISES LOPEZ
CASE NUMBER: 3:05-CR-030-K (02)

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance.

The defendant shall cooperate in the collection of DNA as directed by the U. S. Probation Officer, as authorized by the Justice for All Act of 2004.

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et. seq. As a further condition of supervised release, if ordered deported or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be in the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U. S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall not possess a firearm as defined in 18 U.S.C.

§ 921.

2. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or re-entry into the United States and at least two periodic drug tests thereafter, as directed by the U. S. Probation Officer.

DEFENDANT: MOISES LOPEZ
CASE NUMBER: 3:05-CR-030-K (02)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Restitution Ordered	Priority or Percentage
TOTALS	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

DEFENDANT: MOISES LOPEZ
CASE NUMBER: 3:05-CR-030-K (02)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐, D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C,☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal

monetary penalties:

The defendant shall pay to the United States a special assessment of $100, for Count 3, which shall be due immediately. Said special assessment shall be made to the Clerk, U. S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX II

DECISION OF THE FIFTH CIRCUIT

U.S. v. Lopez
C.A.5 (Tex.),2007.
Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Fifth Circuit Rule 47.5.4. (FIND CTA5 Rule 47.)

United States Court of Appeals,Fifth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Moises LOPEZ, also known as Moy, Defendant-Appellant.
No. 06-10437.
Summary Calendar.
Decided Feb. 14, 2007.

Background: Defendant was convicted, on plea of guilty before the United States District Court for the Northern District of Texas, of possession with intent to distribute pure methamphetamine. Defendant appealed from sentence.

Holdings: The Court of Appeals held that:

(1) defendant failed to demonstrate entitlement to adjustment of his offense level for acceptance of responsibility;

(2) defendant was not entitled to "safety valve" reduction in sentence; and

(3) defendant's sentence was not unreasonable.

Affirmed.

Frederick M. Schattman, U.S. Attorney's Office, Northern District of Texas, Fort Worth, TX, for Plaintiff-Appellee.
Moises Lopez, Seagoville, TX, pro se.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:05-CR-30-2.

Before JONES, Chief Judge, and JOLLY and OWEN, Circuit Judges.

PER CURIAM:

*1 Moises Lopez appeals the sentence imposed following his guilty plea conviction of possession with intent to distribute pure methamphetamine in violation of 21 U.S.C. § 84 (a)(1) and (b)(1)(A).

Lopez argues that the district court erred by increasing his sentence based on facts not alleged in the indictment or found by the jury, in contravention of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), and in violation of his Sixth Amendment rights. This argument lacks merit. By rendering the Sentencing Guidelines advisory only, *Booker* eliminated the Sixth Amendment concerns that prohibited a sentencing judge from finding all facts relevant to sentencing. *United States v. Mares*, 402 F.3d 511, 519 (5th Cir:), *cert. denied,* --- U.S. ----, 126 S.Ct. 43. 163 L.Ed.2d 76 (2005); *United Stales v. Alonzo*, 435 F.3d 551, 552-54 (5th Cir.2006).

Lopez argues that the district court erred when it denied him an acceptance of responsibility adjustment pursuant to U.S.S.G. §

3E1.1. The record shows that the district court's ruling, based on Lopez's denial of relevant conduct and his attempt to minimize his involvement in the offense, is not without foundation. *See United States v. Brace*, 145 F.3d 247, 264 (5th Cir. 1998) (en banc). The district court therefore did not reversibly err when it denied Lopez an acceptance of responsibility adjustment. *See United States v. Flucas*, 99 F.3d 177, 180 (5th Cir. 1996).

Lopez argues that the district court erred in denying him a "safety valve" reduction pursuant to 18 U.S.C. § 3553(f)(4) and U.S.S.G. § 5C1.2. The district court, relying on information contained in the presentence investigation report (PSR), found that Lopez had a leadership role in the offense. Lopez has not rebutted the presumed reliability of the information contained in the PSR. As a leader of the offense, Lopez was ineligible for the safety valve reduction. *See* 3553(f)(4); § 5C1.2(a)(4). Lopez has not shown that the district court clearly erred in denying the safety valve reduction. *See United States v. Treft*, 447 F.3d 421, 426 (5th Cir.), *cert. denied*, --- U.S. —, 127 S.Ct. 555, 166 L.Ed.2d 413 (2006).

Finally, Lopez argues that his sentence at the bottom of the applicable advisory sentencing guideline range is unreasonable under § 3553(a) because it was greater than necessary to achieve the goals of sentencing. The record shows that the district court considered the sentencing factors set forth at § 3553(a). Lopez's disagreement with the Sentencing Commission's assessment of the seriousness of his offense does not establish that his sentence was unreasonable. *See Alonzo*, 435 F.3d at 554.

AFFIRMED.

FN* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under

the limited circumstances set forth in 5th Cir. R. 47.5.4.

C.A.5 (Tex.), 2007.
U.S. v. Lopez
Slip Copy, 2007 WL 509402 (C.A.5 (Tex.))

END OF DOCUMENT

APPENDIX III

FACTUAL RESUME

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	Case No. 4:05-CR-030-K
	§	(02)
MOISES LOPEZ	§	

FACTUAL RESUME

For Plea Purposes

Indictment: Count 3: - Possession of More than 50 grams of Methamphetamine with Intent to Distribute- 21 U.S.C. §§ 84I(a)(l) and 841(b)(l)(.A)

Penalty: Count 3 - $4,000,000 fine; Not less than ten (10) years nor more than LIFE imprisonment or both such fine and confinement; plus: a 'Term of Supervised Release of net less than five (5) years; plus a Mandatory Special Assessment of $100.00. The defendant is subject to denial, of federal benefits as specified in Title 21 United States Code, § 862a for a period of up to five (5) years and to a permanent denial of certain state and federal assistance and benefits as specified in Title 21 United States Code, §862a. If the defendant violates any condition of the terms of Supervised Release, the court may revoke such release terms and require that the defendant serve any or all of such release tem as a additional period of confinement. The effect of a revocation of a term of supervised release is to make the overall

period of incarceration longer.

ELEMENTS OF THE OFFENSE:

Count Three:

In order to establish the guilt of the defendant of the offense of Possession of More than 50 grams of Methamphetamine with Intent to Distribute as alleged. in Count 3 of the Indictment, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the defendant intentionally or knowingly possessed a mixture and substance containing a detectable amount of the Schedule II controlled substance, methamphetamine.

Second: That the defendant intended to distribute the substance; and

Third: That the substance contained at least 50 grams of pure methamphetamine.

Stipulated Facts:

1. On July 17, 2003 Dallas police narcotics officers were parked in the parking lot of the El Condo bus station located at 3407 West Davis, Dallas, Texas. The officers were awaiting the arrival of a bus at the bus station as part of a routine drug interdiction program. At approximately 6:50 p.m. the officers observed defendant Moises Lopez and Rodrigo Navarro get out of a black Cadillac Escalade bearing Texas license number 7KSZ62 which was parked next to a black Hummer H2 bearing Texas license 8BGWO1. Lopez and Navarro move to the rear of the Escapade. Navarro opened the tail gate of the Escalade and took from it a gallon size clear bag and handed a bag to Lopez. Lopez then walked to the Hummer and placed the bag in the front passenger seat area. Lopez, Navarro, and a third person then went into the bus station. Lopez returned to the Hummer about five minutes later. As Lopez approached the

Hummer, the Dallas officers approached him and engaged him in conversation. In response to the officers' inquiries, Lopez identified himself to them with his Texas drivers license. The officers observed in the passenger floorboard of the Hummer a gallon size bag containing a white crystalline substance.

2. The contents of the gallon size bag were submitted to the Southwest Institute for Forensic Sciences at Dallas for analysis. A forensic analyst determined that the contents consisted of 455 grams of 41% pure methamphetamine. The amount of pure methamphetamine in the bag was 186 grams.

3. Lopez intentionally and knowingly possessed the methamphetamine and intended to distribute to others.

/s/_____ Date Signed: 13 April 06
Moises Lopez, Defendant

/s/_____ Date Signed: 13 April 06

RICHARD B ROPER
UNITED STATES ATTORNEY

_____ Date Signed: _____
FREDERICK M. SCHATTMAN
Assistant United States Attorney

APPENDIX IV

INDICTMENT

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	SEALED
	§	
v.	§	
	§	
FRANCISCO FLORES, Jr.	§	
a/L/a "Tank" (01)	§	Case No.
MOISES LOPEZ	§	305 CR-30-K
a/k/a "Moy" (02)	§	
JOHN BARRETT GROTE	§	
a/k/a "Jeb" (03)	§	
CHELSEA LANE COFFMAN (04)	§	
PRISCILLA PENA (05)	§	

INDICTMENT

The Grand Jury Charges:

Count One

Conspiracy to Possess with Intent to Distribute and to Distribute
More than 50 grams of Methamphetamine
(Violation of 21 U.S.C. §§ 846 and 841(b)(1)(A))

Commencing on or about June 1, 2000, the exact date being unknown, and continuing thereafter until at least April 28, 2004 in the Dallas Division of the Northern District of Texas, and elsewhere, the defendants Francisco Flores, Jr., a/k/a "Tank", Moises Lopez, a/k/a "Moy", John Barrett Grote, a/k/a "Jeb", Chelsea Lane Coffman, and others, both known and unknown to the Grand Jury, did intentionally and knowingly combine, conspire, confederate, and

agree to engage in conduct in violation of the Controlled Substances Act, namely: to possess with intent to distribute and to distribute more than 50 grams of pure methamphetamine, a Schedule II controlled substance.

Manner and Means

Among the manner and means used by the conspirators to promote, facilitate, and carry on the aforesaid conspiracy were the following;

1. It was a part of the conspiracy that the conspirators would purchase and sell a translucent crystalline form of methamphetamine of high purity, commonly referred to as "ice".

2. It was a part of the conspiracy that defendant Moises Lopez, a/k/a "Moy" would distribute bulk quantities, that is amounts in excess of five pounds, of "ice" methamphetamine to defendant Francisco Flores, Jr., a/k/a "Tank", for further distribution to others.

3. It was a part of the conspiracy that defendant Francisco Flores, Jr., a/k/a "Tank" would obtain bulk quantities of "ice" methamphetamine from various sources of supply including defendant Moises Lopez, a/lc/a "Moy" and from others known to the Grand Jury including Mario Beltran, Jorge Salinas, and Jose Amaya, each of whom is named but not indicted.

4. It was a part of the conspiracy that defendant Francisco Flores, Jr., a/k/a "Tank" would distribute "ice" methamphetamine to others including defendant John Grote, a/k/a "Jeb" as well as others known to the Grand Jury, including Christopher Almaguer, a/k/a "Toothpick", and Rufino Deleon, a/k/a "Fino"', and Jeffrey Wade Borho, and William Chen Salee, each of whom is named herein but not indicted,

5. It was a part of the conspiracy that defendant Francisco Flores, Jr., a/k/a "Tank" would open and maintain places for the purpose of selling, storing, and using "ice" methamphetamine, including 1806 Mountain Creek Parkway, Grand Prairie, Texas (known as the "Glass House"), 2526 Skyway, Grand Prairie, Texas (known as the

"Studio"), 3017 Playa Vista, Dallas, Texas, 5027 Stagecoach Drive, Grand Prairie, Texas, and 329 Grenoble, Grand Prairie, Texas,

6. It was a part of the conspiracy that defendant John Barrett Grote, a/k/a "Jeb", would make his residence located at 7125 Araglin Court, Dallas, Texas available to other conspirators for storing "ice" methamphetamine for distribution to others and for storing and secreting the proceeds of the trafficking of "ice" methamphetamine

7. It was a part of the conspiracy that defendant Chelsea Lane Coffman would use her residence, and make it available to other conspirators, for storing "ice" methamphetamine for distribution to others and for storing and secreting the proceeds of the trafficking of "ice" methamphetamine.

8. It was a part of the conspiracy that the conspirators would carry firearms.

9. It was a part of the conspiracy that the conspirators would use the proceeds of the trafficking of "ice" methamphetamine to obtain more "ice" methamphetamine for distribution.

10. It was a part of the conspiracy that the membership of the conspiracy, and the roles, responsibilities, and authority of the conspirators would change from time to time. Alliances among the conspirators would form or be broken. The organization of the conspiracy was fluid.

11. It was a part of the conspiracy that the proceeds of the sale and distribution of "ice" methamphetamine would be used to purchase or lease, and to maintain, cellular telephones, vehicles, residences, and other personal property utilized in the business of the sale and distribution of "ice" methamphetamine.

12. It was a part of the conspiracy that the conspirators would communicate by voice and text using cellular telephones.

13. It was a part of the conspiracy that the conspirators would allow other conspirators to use their residences and their vehicles in carrying on the sale and distribution of "ice" methamphetamine.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, the following Overt Acts, among others were committed by the conspirators:

a. On or about June 21, 2000, in Dallas County; Texas, defendant Francisco Flores, Jr., a/k/a "Tank" possessed with intent to distribute more than 2 kilograms of a mixture and substance containing methamphetamine, a Schedule II controlled substance,

b. On or about January 6, 2001 defendant Francisco Flores, Jr., a/k/a "Tank" and defendant Priscilla Pena purchased a 2001 Chevrolet Corvette from Frank Parra Chevrolet, 1000 East Airport Freeway, Irving, Texas, making a down payment of $18,000 in United States currency, which money was the proceeds of the sale and distribution of "ice" methamphetamine.

c. On or about January 9;2003 in Tarrant County, Texas defendant Francisco Flores, Jr., a/k/a "Tank" possessed 4.3 grams of a mixture and substance containing methamphetamine, a .45 caliber pistol, and $9,290 in United States Currency.

d. On or about April 15, 2003 defendant Francisco Flores, Jr., a/lk/a "Tank" caused to be distributed to Jeffrey Wade Borho, approximately 669.4 grams of a mixture and substance containing 598.255 grams of pure methamphetamine.

e. On or about July 2, 2003 defendant Francisco Flores, Jr., a/k/a "Tank possessed 13.28 grams of a mixture and substance containing a detectable amount of methamphetamine, a 9 mm handgun, and $2,890 in United States currency.

f. On or about July 2, 2003 defendant John Barrett Grote, a/k/a "Jeb," purchased a cashier's check in the amount of $9,500 made payable to CBB, Inc, for the purpose of securing the release of defendant Francisco Flores, Jr., a/k/a "Tank" from jail.

g. On or about July 15, 2003, defendant Chelsea Lane Coffman leased the premises of Apartment 6N, 4777 Cedar Springs Road, Dallas, Texas,

h. On or about July 17, 2003 defendant Moises Lopez, a/k/a

"Moy" distributed approximately one pound of "ice" methamphetamine to defendant Francisco Flores, Jr., a/kla "Tank" in exchange for a 2003 Hummer H2 owned by Flores.

i, On or about July 17, 2003 defendant Moises Lopez, a/k/a "Moy" possessed with intent to distribute 455 grams of a mixture and substance containing 186.55 grams of pure methamphetamine and over $16,000 in United States Currency at the El Conejo bus station in Dallas, Texas..

j. On or about September 3, 2003, in Arlington, Texas, defendant Francisco Flores, Jr., a/k/a "Tank" was stopped by the police for a traffic violation and attempted to flee from the police.

k. On or about February 1, 2004, defendant Chelsea Lane Coffman leased the premises of Apartment 4208, 4400 West. University Blvd,, Dallas, Texas.

l. On or about April 28, 2004, defendant Chelsea Lane Coffman drove from Dallas, Texas to Weatherford, Texas to pay certain probation fees owed by Jose Amaya,

m. On or about April 28, 2004 defendant Chelsea Lane Coffman drove Jose Amaya from 4400 West University Blvd., Dallas, Texas to an apartment complex near 1121 Beachview, Dallas, Texas in order to obtain a quantity of "ice" methamphetamine.

All in violation of 21 U..S.C. §§ 846 and 841(b)(l)(A).

Count Two
Engaging in Monetary Transactions In Property
Derived from Specified Unlawful Activity
(A violation of 18 U.S.C. § 1957(a))

On or about January 6, 2001, in the Dallas Division of the Northern District of Texas, defendant Francisco Flores, Jr., a/k/a "Tank" and defendant Priscilla Pena, did knowingly engage in a monetary transaction in criminally derived property of a value greater than ten thousand dollars ($10,000) which property was derived from

a specified unlawful activity; that is to say that the defendants did knowingly tender eighteen thousand dollars ($18,000) in United States currency to Frank Parra Chevrolet Autoplex, a business engaged in vehicle sales, in partial payment for a 2001 Chevrolet Corvette, and such United States currency was, as the defendants well knew, property derived from the felonious receiving, concealment, buying, sell, and otherwise dealing in "ice" methamphetamine, a controlled substance, in violation of the laws of the United States.

A violation of 18 U.S.C. § 1957(a);

Count Three

Possession of more than 50 grams of Methamphetamine
With Intent to Distribute
(A violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A))

On or about July 17, 2003, in the Dallas Division of the Northern District of Texas, defendant Moises Lopez, a/k/a "Moy" did intentionally and knowingly possess with intent to distribute 455 grams of a mixture and substance containing 186.55 grams of pure methamphetamine, a schedule II controlled substance.

A violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A).

Count Four

Maintaining Drug Involved Premises
(A violation of 21 U.S.C. §§ 856(a)(1) and 856(a)(2))

Commencing on or about July 15, 2003 and continuing thereafter until on or about February 1, 2004, in the Dallas Division of the Northern District of Texas, Chelsea Lane Coffman, defendant, did intentionally and knowingly open, lease, rent, use, and maintain a place, namely Apartment 6N, 4777 Cedar Springs Road, Dallas, Texas, for the purpose of distributing and using the controlled substance "ice" methamphetamine; and, as lessee of such place, did

manage and control such place, and did knowingly and intentionally make such place available for the purpose of unlawfully storing, distributing and using the controlled substance "ice" methamphetamine.

A violation of 21 U.S.C. §§ 856(a)(1) and 856(a)(2).

Count Five

Maintaining Drug Involved Premises

(A violation of 21 U.S.C. §§ 856(a)(1) and 856(a)(2))

Commencing on or about February 1, 2004 and continuing thereafter until on or about April 28, 2004, in the Dallas Division of the Northern District of Texas, Chelsea Lane Coffman, defendant, did intentionally and knowingly open, lease, rent, use, and maintain a place, namely Apartment 4208, 4400 West University, Dallas, Texas, for the purpose of distributing and using the controlled substance "ice'° methamphetamine; and, as lessee of such place, did manage and control such place, and did knowingly and intentionally make such place available for the purpose of unlawfully storing, distributing and using the controlled substance "ice" methamphetamine.

A violation of 21 U.S.C. §§ 856(a)(1) and 856(a)(2).

Count Six

Maintaining Drug Involved Premises

(A violation of 21 U.S.C. §§ 856(a)(1) and 856(a)(2))

Commencing on or about September 1, 2002, the exact date being unknown, and continuing thereafter until on or about February 1, 2004, in the Dallas Division of the Northern District of Texas, John Barrett Grote, a/k/a "Jeb", defendant, did intentionally and knowingly open, lease, rent, use, and maintain a place, namely, his residence located at 7125 Araglin Court, Dallas, Texas , for the

purpose of distributing and using the controlled substance "ice" methamphetamine; and, as owner of such place, did manage and control such place, and did knowingly and intentionally make such place available for the purpose of unlawfully storing, distributing and using the controlled substance "ice" methamphetamine.

A. violation of 21 U.S.C. §§ 856(a)(l) and 856(a)(2).

FORFEITURE ALLEGATIONS

1. Upon conviction of the offense alleged in Count One of this Indictment, the defendants Francisco Flores, Jr., a/k/a "Tank", Moises Lopez, a/k/a "Moy", John Barrett Grote, a/k/a "Jeb", and Chelsea Lane Coffman, shall forfeit to the United States in accordance with 21 U.S.C, § 853 any property constituting, or derived from proceeds obtained, directly or indirectly, by the said defendants, as a result of the said violation and any of their property used, or intended to be used, to any manner or part, to commit, or to facilitate the commission of the said violation, including but not limited to the following:

a. A sum of money equal to $3,000,000 in United States currency, representing the amount of proceeds obtained as a result of said offense, for which the defendants are jointly and severally liable,

2: Upon conviction of the offense alleged in Count One or Count Six of this Indictment, the defendant John Barrett Grote, a/k/a "Jeb", shall forfeit to the United States in accordance with 21 U.S.C. § 853 any property constituting, or derived from proceeds he obtained, directly or indirectly, as a result of the said violation and any of his property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the said violation, including but not limited to the following:

a. All of that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures, attachments and

easements, located at 7125 Araglin Court, Dallas, Texas, 75230, and more particularly described as follows: Being Lot 3, Block G/7464 of Araglin Court, an Addition of the City of Dallas, Dallas County, Texas according the to Plat thereof recorded in Volume 97066, Page 2780, Map Records, Dallas, County, Texas:

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendant(s)

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p) to seek forfeiture of any other property of the said defendant(s) up to the value of the forfeitable property described above.

A TRUE BILL

RICHARD B. ROPER
UNITED STATES ATTORNEY

/s/

FREDERICK M. SCHATTMAN
Assistant United States Attorney
State Bar of Texas No. 17728400
Burnett Plaza, Suite 1700
801 Cherry Street, Unit #
4 Fort Worth, Texas 76102
Telephone: 817.252.5200
Facsimile: 871.978.3094

APPENDIX V

PLEA AGREEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT 0F TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 3:05-CR-030-K
	§	
MOISES LOPEZ (02)	§	

PLEA AGREEMENT

Moises Lopez (the defendant), Lou Merren, the defendant's attorney, and the United States of Arnerioa, (the government), agree as follows:

1. **Rights of the defendant**: The Defendant understands that he the rights

   a. to plead not guilty;
   b. to have a trial by jury;
   c. to have his guilt proven beyond a reasonable doubt;
   d. to confront and cross-examine witnesses and to call witnesses in his defense; and
   e. against compelled self-incrimination.

2. **Waiver of rights and plea of guilty:** The Defendant waives these rights and pleads guilty to the offense alleged in Count Three of the 1ndictment, charging a violation of 21 U.S.C. §§ 841(a)(1) and

841(b)(1)(A), that is, Possession of More than 50 grams of Methamphetamine with Intent to Distribute. The Defendant understands the nature and elements of the crimes to which he is pleading guilty, and agrees that the factual resume he has signed is true and will he submitted as evidence.

3. **Sentence:** The penalties the Court cart impose include:

    a. imprisonment for a period of not less than ten (10) years nor move than Life;
    b. a total fine not to exceed the greater of 4,000,000 or twice any pecuniary gain to the defendant or loss to the victim(s);
    c. a mandatory term of supervised release of five (5) years, which must follow any term of imprisonment. If the Defendant violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;
    d. a mandatory spacial assessment of $100.00;
    e. restitution to victims or to the community, which may be mandatory under the law, and which the Defendant agrees may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone; and.
    f. costs of incarceration and supervision.
    g. denial of certain federal benefits (as defined in 21 USC § 862(d) for a period of five (5) years;
    h. permanent ineligibility for assistance under any state program funded under part A of Title I Vof the Security

Act; and

I. Permanent ineligibility for benefits under the food stamp program or any state program carried out under the Food Stamp Act of 1977.

4. **Court's sentencing discretion and role of the Guidelines:** The defendant understands that the sentence in this case will be imposed by the Court after consideration of the United States Sentencing Guidelines. The guidelines are not binding on the Court, but are advisory only. The defendant has reviewed the guidelines with his attorney but understands no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case. The defendant will not be allowed to withdraw his plea if his sentence is hirer than expected. The defendant fully understands that the actual sentence imposed, so long as it is within the Statutory maximum, is solely in the: discretion of the Court.

5. **Mandatory special assessment:** The Defendant agrees to pay to the U.S. District Clerk the amount of 100.00, in satisfaction of the mandatory special assessment in this case.

6. **Defendant's Obligations:** The Defendant agrees to persist in his plea of guilty through sentencing.

7. Upon demand, the Defendant shall submit a personal financial statement under oath and/or submit to interviews by the United States Attorney's Office regarding Defendant's capacity to satisfy any fines.

8. **Government's Obligations:** The government will not bring any additional charges against the defendant based upon the conduct set out in the Factual Resume if the defendant fulfills all terms of this agreement, the Government will move the Court to dismiss the

remaining counts of the Indictment.

9. This agreement is limited to the United States Attorney's Office for the Northern District of Texas and does not bind any others federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against the defendant or any property.

10. **Violation of agreement:** The Defendant understands that if he violates any provision of this a agreement or if his guilty plea is vacated or withdrawn, the government will be free from, any obligations of the agreement and, free to prosecute the defendant for all offenses of which it has knowledge. In such event, the defendant waives, any objections based upon delay in. prosecution. If the plea is vacated or withdrawn for any reason other than a finding that it was involuntary, the defendant also waives objection to the use against him of any information or statements he has provided to the government, and any resulting leads.

11. **Voluntary plea:** This plea of guilty is freely and voluntarily made and is not the result of force or threats, or of promises apart from those set forth in this plea agreement. There have been no guarantees or promises from anyone as to what sentence the Court will impose.

~~12. **Waiver of right to appeal or otherwise challenge sentence:** The defendant waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. The defendant, however, reserves the rights to bring (a) a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic~~

~~error at sentencing, and (b) to challenge the voluntariness of his plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.~~

13. **Representation of Counsel:** The Defendant has thoroughly reviewed all legal and factual aspects of this case with his lawyer and is fully satisfied with that lawyer's legal representation. The Defendant has received from his lawyer explanations satisfactory to him concerning each paragraph of this plea agreement, each of his rights affected by this agreement,, and the alternatives available to him other than entering into this agreement Because he concedes that he is guilty, and after conferring with his lawyer, the defendant has concluded that it is in his best interest to enter into this plea agreement and all its term, rather than proceed to trial in this case.

14. **Entirety of Agreement:** This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties.

AGREED TO AND SIGNED on the dates shown below:

RICHARD B. ROPER
UNITED STATES ATTORNEY

/s/_____

Moises Lopez
Defendant
Date Signed: 13 Sept 05

_____

Frederick M. Schattman
Assistant United States Attorney
Texas State Bar Bumver 017728400
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102-6897
Telephone: 817/252-5200
Date Signed: _____

/s/_____

Lou Merren
Attorney for Moises Lopez
Date Signed: _____

_____

Paul Gartner
Deputy Criminal Chief
Assistant United States Attorney
Date Signed: _____

I have read (or had read to me) this Plea Agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

/s/_____

Moises Lopez
Date Signed: 13 Sept 05

I am the defendant's counsel; I have carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge and belief, my client's decision to enter into this Plea Agreement is an informed and voluntary one.

/s/_____

Lou Merren
Attorney for Moises Lopez
Date Signed: _____

APPENDIX VI

PRE-SENTENCE REPORT

CONFIDENTIAL

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	)
	)
v.	) PRESENTENCE
	) REPORT
MOISES LOPEZ	) Case No. 3:05-CR-030-K(02)

Prepared for: The Honorable Ed Kinkeade
U.S. District Judge

Prepared by: Senior USPO Terri L. Lassiter
Fort Worth, Texas
(817) 978-3633, Ext. 229

Assistant U.S. Attorney	**Defense Counsel (Appointed)**
Fredrick.Schattman	Luis A. Merren, Jr.
801 Cherry Street, Suite 1700	5353 Maple Avenue, Suite 100
Fort Worth, Texas 76102-6897	Dallas, Texas 75235
(817) 252-5200	(214) 634-0771

Sentence Date: January 5, 2006

Offense: Count 3 of the six-count Possession of More Than 50 Grams of Methamphetamine With Intent to Distribute (21 USC § 841(a)(1) & (b)(1)(A)) - Not less than 10 years or more than Life imprisonment, $4,000,000 fine, a Class A felony. Indictment:

Count 1 is to be dismissed as to this defendant only.

Date Offense Concluded: July 17, 2003

Release Status: The defendant was arrested on January 31, 2005. He has been in Federal custody since that date.

Detainers: Immigration

Codefendants: See attached list.

Related Cases: See attached list.

Date Report Prepared: November 22, 2005

Identifying Data:

Date of Birth: September 1, 1973

Age: 32

Race: White/Hispanic

Sex: Male

Social Security No.: 641-12-2238

FBI No.: 257645CC6

U.S. Marshals No.: 32182-177

Texas DL No.:	15659783
Texas DPS No.:	07133157
INS No.:	70598018
TXN PACTS No.:	45692
Education:	Eighth grade
Dependents:	Three (Self and two children)
Citizenship:	Republic of Mexico
Mailing Address:	Federal Detention Center 2113 North Highway 175 Seagoville, Texas 75159
Residence Address:	235 West Pembroke Dallas, Texas 75208
Aliases:	Nickname: Moy

Photo not available

Restrictions on Use and Redisclosure of Presentence Report. Disclosure of this Presentence Report to the Federal Bureau of Prisons and redisclosure by the Federal Bureau of Prisons is authorized by the U.S. District Court solely to assist administering the offender's prison sentence (i.e. classification, designation, programming, sentence calculation, prerelease planning, escape apprehension, prison disturbance response, sentence commutation or pardon) and other limited purposes, including deportation

proceedings and Federal investigations directly related to terrorists activities. If this Presentence Report is redisclosed by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the Federal judiciary and the Department of Justice that further redisclosure of the Presentence Report is prohibited without the consent of the sentencing judge.

DEFENDANT LIST

Case No. 3:05-CR-030-K

Francisco Flores, Jr., aka Tank (01)	Pleaded guilty to Counts 1 and 2 of the Indictment (relating to drug distribution and money laundering) on September 21, 2005. Sentencing is scheduled for December 22, 2005.
Moises Lopez, aka Moy (02)	Pleaded guilty to Count 3 of the Indictment (relating to drug distribution) on October 6, 2005. Sentencing is scheduled for January 5, 2006.
John Barrett Grote, aka Jeb (03)	Pleaded guilty to Count 1 of a superceding Information (relating to maintaining a drug premise) on September 21, 2005. Sentencing is

	scheduled for December 22, 2005.
Chelsea Lane Coffman (04)	Pleaded guilty to Count 1 of the Indictment (relating to drug distribution) on September 21, 2005. Sentencing is scheduled for December 15, 2005.
Priscilla Pena (05)	Pleaded guilty to Count 2 of the Indictment (relating to money laundering) on September 13, 2005. Sentencing is scheduled for December 15, 2005.

RELATED CASE LIST
Case No. 4:04-CR-179-A

William Chen Salee (01)	Pleaded guilty to Count 1 of the Indictment (relating to drug distribution) on November 24, 2004. On March 25, 2005, he was sentenced to 292 months custody and a 4-year term of supervised release.
Jorge Salinas (02)	Pleaded guilty to Count 1 of the Indictment (relating to drug distribution) on January 7, 2005. On April 22, 2005, he was sentenced to 360 months custody and a 5-year term of supervised release.

RELATED CASE LIST
Case No. 4:04-CR-152-A

Rufino DeLeon (01)	Fugitive.
Christopher Almaguer (02)	On November 22, 2004, found guilty of Counts 1, 2, 3, 4, 5, and 6 of a superceding Indictment (relating to drug distribution, a weapons offense, and money laundering). On March 25, 2005, he was sentenced to a total of 420 months custody and a 5-year term of supervised release.

PART A. THE OFFENSE

Charge and Conviction

1. Francisco Flores, Jr., aka Tank; Moises Lopez, aka Moy; John Barrett Grote, aka Jeb; Chelsea Lane Coffman; and Priscilla Pena were named in a six-count Indictment filed in the Northern District of Texas, Dallas Division, on March 2, 2005. Count 1 charged Flores, Lopez, Grote, and Coffman with Conspiracy to Possess With Intent to Distribute More Than 50 Grams, of Methamphetamine, in violation of 21 USC §§ 846 & 841(b)(1)(A). Count 2 charged Flores and Pena with Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity, in violation of 18 USC § 1957(a). Count 3 charged Lopez with Possession With Intent to Distribute More Than 50 Grams of Methamphetamine, in violation of 21 USC § 841(a)(1) & (b)(1)(A). Counts 4 and 5 charged Coffman with Maintaining a Drug Involved Premise, in violation of 21 USC §

856(a)(1) & (a)(2). Count 6 charged Grote with Maintaining a Drug Involved Premise, in violation of 21 USC § 856(a)(1) & (a)(2). Other than the six counts, the Indictment also contained forfeiture allegations. Specifically, upon conviction of the offense alleged in Count 1, defendants Flores, Lopez, Grote, and Coffman shall forfeit to the United States, in accordance with 21 USC § 853, any property derived from, or used to facilitate the commission of the violation, including but not limited to a sum of money equal to $3,000,000, representing the amount of proceeds obtained as a result of the offense, for which the defendants are jointly and severally liable. Additionally, upon conviction of the offense alleged in Counts 1 and 6 of the Indictment, defendant Grote shall forfeit to the United States, in accordance with 21 USC § 853, any property derived from, or used to facilitate the commission of the violation, including but not limited to the property located at 7125 Araglin Court, Dallas, Texas.

2. On January 31, 2005, Lopez was arrested by Federal agents without incident. On the same date, Lopez appeared before U.S. Magistrate Judge Charles Bleil in Fort Worth Texas, for an initial appearance. At the conclusion of the hearing, the Court ordered the defendant temporarily detained pending a detention hearing. On February 8, 2005, a detention hearing was held, at which time the defendant was remanded to Federal custody to await the outcome of his case. Lopez has remained at the Federal Correctional Institution in Seagoville, Texas, since his initial arrest.

3. On March 22, 2005, Lopez appeared for arraignment before U.S. Magistrate Judge Paul D. Stickney in Dallas, Texas. During the arraignment hearing, the defendant entered a plea of not guilty to Counts 1 and 3 of the Indictment.

4. On October 6, 2005, Lopez appeared before Magistrate Judge Stickney for rearraignment, at which time he pleaded guilty to Count 3 of the Indictment, pursuant to a written Plea Agreement. The Court ordered a Presentence Report, and scheduled sentencing before Judge Kinkeade on December 22, 2005. On October 6, 2005, Magistrate Judge Stickney issued a Report and Recommendation Concerning Plea of Guilty, recommending the defendant's plea of guilty be accepted, and that the defendant be adjudged guilty. On October 31, 2005, Judge Kinkeade issued an Order Accepting Report and Recommendation of the United States Magistrate Judge Concerning Plea of Guilty.

5. Pursuant to the Plea Agreement, the defendant stipulated to the accuracy of the Factual Resume, acknowledged his plea of guilty was freely and voluntarily made, and stated he was satisfied with his attorney's legal representation. Upon demand, the defendant agreed to submit a Personal Financial Statement under oath and/or submit to interviews by the U.S. Attorneys Office and the U.S. Probation Office regarding his capacity to satisfy any fines or restitution. The defendant also agreed to pay a mandatory special assessment of $100.

6. In exchange for the defendant's plea of guilty, the Government agreed not to bring any additional charges against the defendant based upon the conduct set out in the Factual Resume. Additionally, the Government agreed to dismiss Count 1 of the Indictment.

7. Based on the defendant's offense of Possession With Intent to Distribute More Than 50 Grams of Methamphetamine, 18 USC § 4042 requires probation officers to notify the State Attorney General and local law enforcement when a change of residence to another local law enforcement jurisdiction occurs while under

supervised release supervision. Furthermore, based on the defendant's felony convictions, the defendant is required to cooperate in the collection of DNA pursuant to the provisions of Section 203(b) of Public Law 108-405 (118 Stat 2260) which amends 42 USC § 14135a(d)(1) and 10 USC § 1565(d) to revise DNA collection requirements under the Justice for All Act of 2004.

The Offense Conduct

8 The information presented in this section of the Presentence Report was gathered during an independent investigation of the offense conducted by this officer. Offense details were obtained from the Indictment, superseding Information, and Factual Resumes filed in this case, as well as Indictments, superseding Indictments, and Factual Resumes filed in related cases. Investigative reports prepared primarily by Drug Enforcement Administration (DEA) Agent T. McAuliffe and Internal Revenue Service (IRS) Agent Chad Yarbrough were also used, as well as offense reports from various local police departments in Texas, including reports from the Arlington Police Department, Fort Worth Police Department, Dallas Police Department, Mesquite Police Department, Grand Prairie Police Department, Euless Police Department, and Temple Police Department. Furthermore, investigative reports from the Alcohol, Tobacco, and Firearms (ATF) and offense reports from the Department of Public Safety and various drug task forces in the Dallas/Fort Worth area were reviewed. Additionally, this officer conducted extensive interviews with Agents McAuliffe and Yarbrough on December 8, 2004, and January 6, 2005. This officer also conducted several follow-up interviews with Agent McAuliffe throughout January 2005. Clarifying information gleaned from those interviews was also used. All of the information contained herein is based on

evidence considered reliable by this probation officer.

9. In August 2003, DEA received information from a cooperating co-offender regarding the drug trafficking activities of Francisco Flores. The informant explained that Flores was responsible for the distribution of multi-pound quantities of Ice throughout the Dallas/Fort Worth, Texas, metroplex area. (Ice is a mixture or substance containing d-methamphetamine hydrochloride with a high level of purity.) Based on information provided by the cooperating co-offender, a joint investigation known as "*Operation Ice Breaker*" was initiated by the DEA and IRS into Flores's illegal drug distribution activities. As DEA and IRS agents began their investigation, they determined numerous co-conspirators within the Flores organization had been arrested in the metroplex area with varying amounts of Ice. Therefore, Federal agents called upon the other law enforcement agencies for assistance, including the Arlington Police Department, Fort Worth Police Department, Dallas Police Department, Mesquite Police Department, Grand Prairie Police Department, Euless Police Department, Temple Police Department, and the Department of Public Safety.

10. As DEA and IRS agents began their investigation, they quickly developed information which indicated Francisco Flores, Jr. was the leader of a major Ice conspiracy comprised of approximately 50 high level and mid-level distributors who, in turn, were responsible for distributing Ice to other low level and street level dealers in the Dallas/Fort Worth metroplex, as well as in other cities in Texas, including Austin and Temple. The investigation developed into a multi-phase investigation, in that, DEA's goal was to determine the extent of Flores' drug trafficking activities, identify his high level and mid-level distributors, and finally, identify Flores's source(s) of supply.

11. The investigation into this case is currently ongoing. Throughout the investigation, law enforcement officials have utilized physical surveillance, conspiracy members' telephone records, traffic stops, and the execution of search warrants and arrest warrants. Those techniques have led to various seizures of Ice, large amounts of U.S. currency (drug proceeds), and firearms. Additionally, numerous cooperating co-offenders have provided detailed information to DEA agents which helped agents determine the magnitude of the criminal activity and allowed them to develop an historical perspective of the Flores organization. The information included identifying conspiracy members and their respective roles, identifying "stash houses" used by conspiracy members, and providing information relating to overall drug amounts for which the conspiracy is responsible. The intelligence gathered as well as the physical evidence seized, has led Federal agents to conclude the Flores organization was one of the largest Ice conspiracies operating in the Dallas/Fort Worth area.

12. As previously stated, Ice is a mixture or substance containing d-methamphetamine hydrochloride with a high level of purity. For Federal guideline purposes, Ice is defined as a mixture or substance containing d-methamphetamine hydrochloride with a purity of 80 percent or higher. While it is true some of the methamphetamine seized in this case does not meet the 80 percent purity level, there is no doubt that Flores was purchasing Ice as opposed to "regular' methamphetamine. Typically, Flores paid his sources of supply between $10,000 and $15,000 per pound for Ice, whereas the price for a pound of "regular" methamphetamine would have been much lower, generally between $4,000 and $5,000 per pound. Likewise, Flores's high level distributors sold Ice to their customers at a price commonly associated with Ice, not "regular" methamphetamine. While it

may be true that the Ice was eventually "cut" with various agents (such as MSN, a form of horse minerals), there is no question the Flores conspiracy was distributing Ice.

13. As a result of their investigation, Federal agents identified Francisco Flores, Jr., a 32 year-old well-educated individual, as the conspiracy leader. Flores initially became involved in the drug distribution business in approximately early 2000, through the distribution of multi-pound quantities of marijuana. In approximately mid-2000, Flores became involved in the distribution of multi-pound quantities of powder cocaine. He then learned how to manufacture crack cocaine and began selling it as well. In 2001, Flores was introduced to Ice and he quickly began distributing multi-pound quantities of Ice throughout the Dallas/Fort Worth metroplex.

14. During the life of the conspiracy, Flores utilized several sources of supply for Ice, including Jorge Salinas, Jose Amaya, Mario Beltran, Tito Francisco Garza, and Moises Lopez, as well as others. For the most part, the Ice originated in Mexico and was brought into the United States via the supplier. It was the suppliers' responsibility to deliver the Ice to Flores in the Dallas/Fort Worth metroplex. Flores purchased multi-pound quantities of Ice at a time, generally at a price of between $10,000 and $15,000 per pound. Initially, Flores obtained Ice from Mario Beltran and Francisco Garza. However, from March 2003 through January 2004, Flores primarily obtained Ice, in multi-pound quantities, from Moises Lopez, Jorge Salinas, and Jose Amaya.

15. On numerous occasions, Flores picked up multi-pounds of Ice from Jose Amaya at an apartment, located at 4777 Cedar Springs Road, No. 6N, Dallas, Texas. Amaya lived at the apartment with

his girlfriend, Chelsea Coffman. Coffman leased the apartment and allowed Amaya to use the residence to distribute Ice. Coffman was a dancer at various gentleman clubs in Dallas. She met Flores on the club scene and befriended him. Flores introduced her to Ice and she began to be a regular at Flores's drug parties. As time went on, Coffman became sexually involved with several of Flores's drug suppliers and drug associates, and soon began participating in the distribution of Ice herself. Initially, Coffman distributed drugs on behalf of one of Flores's largest suppliers. Then, she met Jose Amaya, a small time Ice distributor, and she began brokering Ice transactions between her supplier and Amaya. Eventually, Coffman introduced Amaya to Francisco Flores, and he (Amaya) began distributing Ice to Flores.

16. In furtherance of the conspiracy, Flores utilized several locations throughout the metroplex area to store his Ice. The stash houses included a warehouse located at 1806 Mountain Creek Parkway, Grand Prairie, Texas, commonly referred to by conspiracy members as the Glasshouse. The Glasshouse was used primarily during the fall of 2002 and operated under the guise of a location for a legitimate computer-related business. In early 2003, Flores moved his main Ice distribution center to a warehouse located at 2526 Skyway, Grand Prairie, Texas. That location was known by conspiracy members as the Studio. The Studio also operated under the guise as a warehouse for a legitimate business. In addition to those two warehouse settings, the Flores organization also used various personal residences as stash houses, including 3017 Playa Vista, Dallas, Texas; 5027 Stagecoach Drive, Grand Prairie, Texas; 329 Grenoble, Grand Prairie, Texas; and, 7125 Araglin Court, Dallas, Texas.

17. Once Flores obtained Ice, he employed several high level

distributors to aid him in the further distribution of the Ice. Those high level distributors included Rufino DeLeon, Christopher Almaguer, William Salee, Anthony Aguilar, Priscilla Pena and Jeffrey Borho. Pena was Flores's girlfriend and they resided together in an apartment in Grand Prairie, Texas, for several years. During the time that Flores lived with Pena, he was distributing multi-pound quantities of Ice.

18. In addition to his six primary distributors, Flores also utilized others to facilitate his drug business. Those people included Lisa Taguillas (his sister), Marco Montemayor, Dawn Por ter, Michael Oliveraz, and Reginald Wright, among others. In order to communicate with each other, conspiracy members typically used cellular telephones, oftentimes utilizing the text messaging feature of the cell phone.

19. In furtherance of the drug conspiracy, Flores's six primary distributors (DeLeon, Almaguer, Salee, Aguilar, Pena, and Borho) distributed multi-pound quantities of Ice throughout the Dallas/Fort Worth metroplex area. One of the distributors, Jeffrey Borho, also distributed Ice to the Austin and Temple areas. Each primary distributor had their own "cell" (or group) of conspiracy members who assisted them in the further distribution of Ice. Jeffrey Borho employed numerous mid-level distributors, including Lynn Gutherie, Michael McCabe, Scott Howie, Edward Dixon, Kevin Rainey, and Pete Jones. Borho also utilized hits girlfriend, Sandra Benson, as a courier. Priscilla Pena, for the most part, distributed Ice to Jeffrey Ryan and Steven Hitchcock. Anthony Aguilar primarily distributed Ice to Mike Nichols, Katy Miller, Rodney Miller, Michael Cortez, and Kenny Karkalits. William Salee, for the most part, distributed Ice to Jeffrey Brevik, Thomas Morehead, Jeffrey Smith, and Eric Estrada. Salee also used James Hopkins as a courier and, many

times, employed Scott Clement to transport Ice on his behalf. Christopher Almaguer' s largest distributor was Kenneth Brooks. Rufino DeLeon primarily distributed Ice to Scott Clement and Joe Stello. DeLeon also utilized his girlfriend, Lisa Cooper, as a drug facilitator. Once the mid-level distributors obtained the Ice, they delivered it to lower level distributors who, in turn, distributed it to local dealers in their geographic areas. After several more transactions, the Ice was eventually sold to street dealers and drug users.

20. Although the organization operated as described above, the roles of each conspiracy member were not cast in stone and were, often times, fluid. At times, alliances were formed and broken and roles changed. Several conspiracy members attempted to "branch out" with other suppliers, and/or they attempted to become suppliers to the Flores organization themselves. During the life of the conspiracy, Flores elevated certain high ranking conspiracy members to perform additional tasks. For instance, although William Salee operated as a major distributor and head of his own "cell," he was also Flores's "gate keeper" at the Glasshouse and the Studio (stash houses in Grand Prairie). That is, he maintained both locations and oversaw the storage of Ice, including weighing and packaging the Ice and handling the drug proceeds (U.S. currency). Additionally, because of his position, Salee was privy to the comings and goings of conspiracy members at both locations. Salee also worked closely with Rufino DeLeon, who was considered Flores's "right hand man." Flores , also elevated the position of Christopher Almaguer and he, too, worked closely with Flores. On numerous occasions, Almaguer acted as the "middle man" between Flores and Priscilla Pena, and between Flores and Jeffrey Borho. (Both Pena and Borho were high level distributors themselves). During the summer of 2003, after Flores had been arrested numerous times,

he (Flores) appointed Almaguer to take over his drug business so that Flores could become less visible. During that time, Almaguer carried out the duties of conspiracy leader; however, he continued to consult with Flores regarding major decisions.

21. Other than the conspiracy members mentioned above, Flores also recruited John Grote to further his illegal drug activities. Grote was a wealthy real estate tycoon who resided on a large estate in Dallas, Texas. Flores met Grote in the summer of 2002 on the nightclub scene in Dallas and Arlington. Grote was a user of Ice and, over the course of that summer and the succeeding year, Grote befriended Flores, and met and befriended some of Flores's drug associates, including Rufino DeLeon, Christopher Almaguer, Scott Clement, William Salee, Jose Amaya, Chelsea Coffman, Jorge Salinas, and Priscilla Pena. At the time he met Flores, Grote owned and lived in a residence located at 7125 Araglin Court, in Dallas, Texas. Grote allowed Flores, Almaguer, and DeLeon to use his residence as a place to store Ice, and as a place to conduct drug transactions. Grote would also host parties and gatherings at his residence, where party-goers were provided Ice and other controlled substances free of charge. Grote also allowed Almaguer, DeLeon, and Flores to drive his vehicles, which they used to conduct their drug trafficking. Additionally, Grote allowed Flores, Almaguer, and DeLeon to store proceeds from their drug trafficking at his residence on a temporary basis. Grote's residence was located in a small, gated community and provided a "safe haven" for the drug traffickers. At various times between late 2002 and early 2004, Grote permitted Flores, Almaguer, and DeLeon to live (temporarily) at his residence and carry on their drug trafficking activities from the residence. During that period of time, the drug traffickers earned approximately $3,000,000 in gross proceeds from the distribution of Ice. In return for the use of Grote's residence and vehicles

,lores and his drug associates supplied Grote with Ice for his personal use. Because of Grote's wealth, he (Grote) routinely provided Flores with money and took Flores and others on paid vacations. For instance, in late March 2003, Grote leased a private jet and took Flores, DeLeon, Almaguer, Lisa Cooper, and Jennifer Waligora to South Padre Island. In June 2003, Grote leased a jet and took Flores, DeLeon, and others to Laredo, Texas. In July 2003, Grote provided Flores with money to pay a bail bondsman after Flores was arrested. Additionally, in August 2003, Grote used his credit card to pay for Flores's stay at a hotel in Spain.

22. In 2003, as the DEA was closing in on the Flores drug organization, numerous co-conspirators were arrested by local police departments or by the DEA in possession of various amounts of Ice. Some conspiracy members also possessed firearms and large amounts of U.S. currency Flores himself was arrested numerous times with Ice, firearms, and large amounts of cash. As co-conspirators were arrested, they provided post-arrest statements which, in turn led agents to identify more and more conspiracy members.

23. The Francisco Flores drug organization operated from 2001 until Flores was arrested on Federal drug charges on February 3, 2004. The following is a "time line" of some of the major events which took place within the Flores drug organization. The information is presented in chronological order and speaks to the drugs, money, and firearms seized in this case, either through traffic stops or through the execution of search and/or arrest warrants. Additionally, several co-conspirators' debriefing statements are summarized in order to further illustrate the magnitude of the conspiracy and to establish drug amounts.

TIME LINE OF DRUG SEIZURES

24. On June 21, 2000, ATF agents received information indicating Francisco Flores, Jr. was in possession of a large amount of methamphetamine. Later that same date, agents arrested Flores after he fled from Dallas Police Officers in his vehicle at a high rate of speed and was involved in a major automobile accident. Officers subsequently seized 3,052.2 gross grams of methamphetamine from the trunk of Flores's vehicle.

25. On November 7, 2002, Alejandro Torres was arrested by the Arlington Police Department with 441 gross grams of methamphetamine. In post-arrest statements, co-conspirators indicated that Tones had received the methamphetamine from Lisa Taguilas, the sister of Flores, who aided Flores in the distribution of Ice.

26. On November 27, 2002, Jeffrey Borho was arrested by the Temple, Texas, Police Department with 161.77 gross grams of methamphetamine and a 9 mm handgun. During post-arrest statements, Borho stated he obtained the methamphetamine directly from Flores.

27. On January 9, 2003, Flores and Mario Rodriguez were arrested by the Grand Prairie Police Department with 4.3 gross grams of methamphetamine, along with a loaded .45-caliber pistol and $9,290 in U.S. currency.

28. On January 21, 2003, Jeffrey Smith was arrested by the North Richland Hills Police Department and found to be in possession of 83.41 net grams of methamphetamine. After his arrest, Smith led officers to his apartment where an additional 13.33 net grams of methamphetamine, along with a .22-caliber revolver, were

seized.

29. On April 15, 2003, Jeffrey Borho was arrested by the Arlington Police Department on a routine traffic violation after he was observed meeting with Christopher Almaguer and Rufino DeLeon. During a routine search of his vehicle, officers found a total of 669.4 net grams of methamphetamine with a purity of between 88 and 91 percent. In post-arrest statements, Borho indicated the methamphetamine had come from Flores via Almaguer and DeLeon.

30. On April 25, 2003, Arlington Police Officers searched a residence located at 6519 Impala Drive. Edward Dixon and Scott Howell were present during the search and were arrested when officers found 108.5 net grams of methamphetamine.

31. On July 2, 2003, Flores was arrested by the Arlington Police Department with 26 gross grams of methamphetamine, along with a loaded Browning 9-millimeter handgun and $2,890 in U.S. currency.

32. On July 17, 2003, Moises Lopez (one of Flores's suppliers) and Rodrigo Navarro were arrested by the Dallas Police Department at the El Conejo Bus Station in a Hummer belonging to Flores. Officers seized 455 net grams of methamphetamine with a purity of 41 percent (or 186 net grams of pure methamphetamine) and $16,690 U.S. currency.

33. On July 23, 2003, Priscilla Pena was arrested by the Grand Prairie Police Department after she was observed departing the residence of Robert Gordon, located at 3156 Pine Valley, Grand Prairie, Texas. Officers seized 56 net grams of methamphetamine and $4,170 in U.S. currency.

34. On August 8, 2003, Scott Clement was arrested by the Euless Police Department during a traffic stop with 21.12 net grams of methamphetamine. In post-arrest statements, Clement acknowledged he was involved in the Flores organization. Clement indicated he had delivered one-fourth pound of Ice to Mickey Lee Wilkerson just prior to his arrest. According to Clement, the Ice had come from Rufino DeLeon.

35. On August 13, 2003, Grand Prairie police executed a search warrant at the residence of William Salee, located at 2515 Villanova, Grand Prairie, Texas. Upon entering the residence, officers located William Salee in the upstairs bedroom. Jorge Salinas was located in the downstairs bathroom. When officers arrived, Salinas was in the process of dumping methamphetamine from a gallon size Ziploc baggie into the toilet. Officers attempted to stop Salinas and, as a result, they were able to seize 0.99 net gram of methamphetamine from the baggie. Officers also found a briefcase which contained baggies and a digital scale. One of the baggies contained 70.08 net grams of methamphetamine. Salee, in a later meeting with Scott Clement, admitted to Clement that Salinas had flushed 2 pounds (or 907.2 grams) of Ice down the toilet.

36. On August 13, 2003, DEA Agents executed a search warrant at the residence of Jeffrey Smith, located at 2825 North Highway 360, No. 213, Grand Prairie, Texas. Jeffrey Smith and Thomas Morehead were present during the search. Officers seized 583.13 net grams of methamphetamine and $6,683 in U.S. currency.

37. On September 3, 2003, Flores was stopped by the Arlington Police Department on a routine traffic violation. Flores subsequently attempted to flee the scene, during which time he assaulted one of the police officers. Officers were finally able to

place Flores under arrest and he was transported to the Arlington city jail. A search of the defendant's person and his vehicle yielded 2.95 net grams of methamphetamine, along with $2,260 in U.S. currency.

38. On September 7, 2003, officers with the Metro Narcotics Intelligence and Coordination Unit (MNICU) executed a search warrant at an apartment located at 5728 Remington Circle, No. 1619, Fort Worth, Texas. The residence belonged to Kenneth Brooks, one of Christopher Almaguer's drug distributors. During the search, officers found 260.33 net grams of methamphetamine.

39. On September 12, 2003, Department of Public Safety (DPS) Officers arrested Steven Hitchcock who was in possession of 48.5 gross grams of methamphetamine. During post-arrest statements, Hitchcock indicated he obtained the drugs from Jeffrey Smith and provided information concerning his (Smith's) whereabouts.

40. On September 12, 2003, DPS Officers searched a motel room located at the Homegate Studios, 3950 Airport Freeway, Irving, Texas. Jeffrey Smith and Thomas Morehead were. present during the search when officers seized 105 gross grams of methamphetamine and $10,000 in U.S. currency.

41. On September 16, 2003, MNICU Officers executed a search warrant at the residence of Rodney Miller and Katy Miller, located at 1121 Glen Creek, Mansfield, Texas. During the search, officers seized 1,683.2 net grams of methamphetamine with a purity of between 73 percent and 79 percent, along with $11,007 in U.S. currency. Agents had identified the Millers after they were stopped during the surveillance of Manuel Cortez's residence in Arlington, Texas.

42. On September 25, 2003, Manuel Cortez was arrested by the Arlington Police Department with 86.3 gross grams of methamphetamine in his vehicle. Following a search of his residence, located at 1702 East Mitchell Street, Arlington, Texas, officers seized an additional 291 gross grams of methamphetamine, along with $6,325 in U.S. currency and several firearms. Cortez had been identified as a member of the Flores organization from an analysis of Anthony Aguilar's telephone tolls. During post-arrest statements, Cortez admitted to purchasing large quantities of Ice methamphetamine from Flores through Antonio Aguilar.

43. On October 21, 2003, Jeffrey Smith was arrested by the Euless Police Department with 14.2 gross grams of methamphetamine and $777 in cash.

44. On November 22, 2003, Eric Estrada was arrested by the Euless Police Department with 61.82 net grams of methamphetamine.

45. On January 28, 2004, Priscilla Pena was arrested by DPS Troopers going through the Dallas/Fort Worth International Airport. Upon seeing the troopers, Pena dumped methamphetamine on the roadway prior to stopping her vehicle. Officers were able to recover a portion of the methamphetamine on the roadway, as well as methamphetamine from a cup inside her car. The methamphetamine weighed 16.9 net grams and had a purity of 87 percent. In post-arrest statements, Pena indicated the methamphetamine had come from Christopher Almaguer.

46. On January 27, 2004, Jeffrey Brevick was arrested by the Tarrant County Sheriffs Office in possession of 2 grams of methamphetamine.

47. On January 28, 2004, Jeffrey Ryan and Christy Bickerstaff was arrested by the Irving Police Department with 6.6 gross grams of methamphetamine. In post-arrest statements, Bickerstaff indicated that her boyfriend, Jeffrey Ryan, distributed large amounts of Ice on behalf of Priscilla Pena.

48. On February 3, 2004, Flores was arrested by the Tarrant County Sheriffs Office on the Federal search warrant. On the same date, DEA Agents arrested Priscilla Pena on a Federal arrest warrant.

49. On April 1, 2004, officers with the Mesquite Police arrested Christopher Almaguer during a routine traffic stop. Almaguer was in possession of two firearms, including a Ruger P94 handgun, as well as a Smith and Wesson Model 6909 handgun. Almaguer was also in possession of 1.8 net grams of methamphetamine, along with $1,920 in U.S. currency.

50. On April 6, 2004, Mesquite Police Department obtained an evidentiary State warrant on the cellular telephone number carried by Almaguer. Almaguer's cell phone directory contained drug notes which consisted of a list of drug customers and the amount of money they owed him. Among other things, the drug notes revealed that Keneth Brooks had purchased a total of 4 1/2 pounds(2 kilograms) of Ice from Almaguer. Additionally, Almaguar had purchased a total of 9½ pounds (4.3 kilograms) of Ice from supplier Moises Lopez.

51. On August 17, 2004, Federal agents arrested Christopher Almaguer at his parents' residence, 11040 Delford Circle, Dallas, Texas, on a Federal arrest warrant. Agents seized .045 net gram of methamphetamine, along with a Bushmaster 223 semi-automatic rifle. A fully loaded magazine and scope for the rifle were also seized. During post-arrest statements, Almaguer

denied any participation in the Flores drug organization.

52. On August 19, 2004, Kenneth Brooks was arrested by the Dallas Police Department at the Residence Inn by Marriott in Dallas. He was taken into custody for a bond forfeiture relating to a pending drug case. A search of the motel room yielded 43.6 net grams of methamphetamine, along with drug distribution paraphernalia and $20,000 in U.S. currency.

53. On April 29, 2004, Jose Amaya and Chelsea Coffman were arrested by the Dallas, Texas, Police Department in possession of 120 net grams of methamphetamine and a loaded Glock .40-caliber handgun.

54. On October 28, 2004, William Salee and Jorge Salinas were arrested by Federal agents on Federal warrants for drug trafficking.

55. On January 31, 2005, Moises Lopez was arrested by Federal agents. On March 10, 2005, John Grote was arrested by Federal agents. On March 15, 2005, Chelsea Coffman was arrested by Federal agents.

TIME LINE OF CONSPIRACY MEMBERS DEBRIEFINGS

56. On April 17 and August 1, 2003, DEA Agents interviewed Jeffrey Borho regarding his drug trafficking activities. During the interview, Borho stated that for the past year, he had obtained Ice methamphetamine from Francisco Flores, Jr . For $14,000 to $15,000 per pound. After several successful transactions, Flores provided Borho with his cellular telephone number and he (Borho) began obtaining Ice from Flores on a regular basis. Initially, Borho purchased 6 ounces (170 grams) of Ice from

Flores at a time, but eventually he began purchasing Ice in pound quantities after Flores advised him he (Flores) could provide as much as 10 pounds (4.5 kilograms) of Ice at a time. Within a short period of time, Flores was "fronting" Borho as much as 6 to 7 pounds (2.7 to 3.1 kilograms) of Ice per week. In all, Borho estimated he purchased approximately 50 pounds (22.6 kilograms) of Ice from Flores. Furthermore, on a weekly basis, Borho paid Flores between $70,000 and $90,000 in drug proceeds for the Ice.

57. On August 18, 2003, DEA Agents interviewed Mario Beltran, who identified himself as one of Flores's sources of supply for Ice. Beltran told agents he supplied Flores with multi-pound quantities of Ice from 2001 through 2002. When Flores needed Ice, he (Flores) sent Michael Pina or William Salee to obtain the Ice from Beltran. Beltran estimated that during 2001 and 2002, he was involved in 30 Ice transactions with Flores, each transaction consisting of 3 to 5 pounds (1.4 to 2.2 kilograms). Beltran also stated that Flores had paid him as much as $40,000 in U.S. currency at one time for Ice. On occasion, Flores made partial payments and Beltran fronted him the rest. According to Beltran, the most Flores ever owed Beltran was $25,000. (Based on Beltran's estimation, it can be concluded Flores purchased between 42 to 66 kilograms of Ice from Beltran.) Additionally, Beltran identified Moises Lopez, as one of Flores's suppliers. On one occasion, he observed Moises Lopez give Flores 1 pound (453.6 grams) of Ice. Beltran also identified Priscilla Pena as Flores s ex-girlfriend who frequently made drug deliveries on Flores's behalf. Beltran witnessed approximately 15 drug transactions between Pena and Flores. Pena routinely delivered money to Beltran for payment of Ice. It was not uncommon for Pena to deliver as much as $25,000 cash to Beltran at one time.

58. After Flores's arrest on September 3, 2003, he agreed to an interview with DEA Agents.. During the interview, Flores stated he utilized as many as 10 people as sources of supply for Ice. Each had the ability to provide him with between 10 to 20 pounds (4.5 to 9 kilograms) of Ice at any given time. Flores recalled he had been involved in a 50-pound (22 kilogram) Ice transaction in the past. Flores stated several of his customers purchased as much as 10 pounds (4.5 kilograms) of Ice each week. Flores identified his customers as Jeffrey Borho, Jeffery Sth, Priscilla Pena, Rufino DeLeon, and William Salee. Flores indicated Salee was receiving as much as 10 to 15 pounds (4.5 to 6.8 kilograms) of Ice each week.

59. On October 22, 2003, Federal agents interviewed Jeffrey Smith. Smith advised agents he started out purchasing 4 ounces (113.4 grams) of Ice from Flores. Initially, Flores charged him $16,000 a pound; however, when Flores saw how much Ice Smith could move, he lowered the price to $13,000 a pound. According to Smith, his last Ice transaction with Flores involved 3 pounds (1.3 kilograms). Almaguer was also present during the transaction. When Flores was not available, Smith went to Almaguer or Salee for Ice. Smith estimated he had purchased a total of 50 pounds (22.6) kilograms of Ice from Flores. Smith also indicated that at one point, he began dealing with Salee directly. Smith estimated he purchased between 4 ounces to 3 pounds (113.4 grams to 1.3 kilograms) of Ice from Salee approximately 20 to 30 times (which would conservatively equal between 2.2 to 26 kilograms of Ice). According to Smith, Salee obtained Ice from Jorge Salinas.

60. On October 30, 2003, DEA Agents interviewed a Confidential Informant (CI). The CI reported that he had purchased small amounts of Ice from Pena in the fall of 2002. The CI stated that

after a period of time, he traveled around with Pena and meet with Francisco Flores to acquire larger amounts of Ice. During that time, the CI observed Pena obtain gallon size bag quantities of Ice from Flores. The CI also indicated he observed Pena conduct Ice transactions with Steven Hitchcock on approximately 20 occasions. Normally, Hitchcock purchased between $1,500 and $3,000 worth of Ice from Pena at one time.

61. On February 3 and 19, 2004, Federal agents interviewed Priscilla Pena regarding her knowledge of the Francisco Flores drug organization. Pena indicated she had met Francisco Flores in late 1999. Thereafter, they had a romantic relationship and lived together for a period of time. Early on, Pena realized Flores was in the drug business. Initially, Flores began obtaining 4 ounces (113.4 grams) of Ice from William Salee. By 2002, Flores was obtaining pound quantities of Ice from several sources. During that same time frame, Pena started distributing Ice to Steven Hitchcock. Initially, she provided him with 14 grams of Ice each week. By the spring of 2003 she was selling Hitchcock between 2 to 4 ounces (56.7 to 113.4 grams) of Ice per week. Additionally, she sold Robby Rector 14 grams of Ice per week. Pena advised agents her source of supply was Francisco Flores and later, William Salee. On one occasion, Pena had observed Salee with 2 to 3 pounds (907.2 grams to 1.36 kilograms) of Ice at his residence. Pena indicated she purchased 1 ounce (28.35 grams) quantities of Ice from Flores for $1,000. Pena estimated that the most she ever purchased from Flores at one time was between 4 or 5 ounces (113.4 to 141.7 grams) of Ice. Pena also indicated she had dealt with Christopher Almaguer on two occasions, each time receiving 1 pound (453.6 grams) of Ice. Pena explained that during the times Flores was unavailable, he left Almaguer's cellular telephone number on his voice mail message and instructed conspiracy members to contact him (Almaguer)

regarding any drug related business.

62. On March 2, 2004, DEA Agents interviewed Scott Clement. Clement indicated that in early 2001, he obtained user amounts of Ice from Jeffrey Brevik. During that same time frame, he met William Salee, who was supplying Brevik with large quantities of Ice on behalf of Francisco Flores. After Brevick was arrested, he (Clement) began purchasing Ice from Salee. In the fall of 2002, Clement began purchasing 1 ounce quantities (or 28.35 gram quantities) from Salee. In March 2003, Clement began to make Ice deliveries on behalf of Salee and became a more trusted member of the Flores organization. In the spring of 2003, Clement went to the Studio (a stash house) in Grand Prairie and joined Francisco Flores, William Salee, Lisa Teguilas, and Antonio Aguilar in a room where 10 to 20 pounds (4.5 to 9 kilograms) of Ice was laying on a table, alongside a large sum of money and several firearms. When Clement entered the room, he observed Salee attempting to hide the Ice in the wall. In the summer of 2003, Flores began getting arrested and Clement continued to assist Salee and Rufino DeLeon in the distribution of Ice. During that same time frame, Clement met Jorge Salinas and observed him collecting money from Flores on behalf of Salee. Clement was also present during a meeting between Salee and Salinas in which Salee agreed to cover a portion of a $28,000 drug debt Flores owed Salinas. (At that time, Flores was in custody and could not repay the debt.) Thereafter, Salinas began to deal directly with Salee, which did not set well with either DeLeon or Flores. Clement went on to tell agents that he acquired Ice from DeLeon at the residence of Lisa Cooper, located at 329 Grenoble, Grand Prairie, Texas. On one occasion, Clement observed between 35 to 40 pounds (15.8 kilograms to 18 kilograms) stored in a black garbage bag at the residence. Clement also told agents that in July and August, until his arrest

in August 2003, he was delivering 2 to 3 pounds (907.2 grams to 1.36 kilograms) to Mickey Lee Wilkerson per week. Just prior to July 2003, Clement was making deliveries of Ice two to three times a night to Charles Smith on behalf of Salee. Clement estimated that Charles Smith was distributing 2 to 3 pounds (907.2 grams to 1.36 kilograms) of Ice on a weekly basis until Smith's arrest in October 2003. Clement also indicated he was aware that Christopher Almaguer picked up money from Flores from Salee.

63. On March 17, 2004, DEA Agents interviewed Francisco Flores pursuant to a Proffer Agreement. Flores stated he first became involved in the distribution of Ice in 2000. At that time, he was purchasing one-half pound (226.8 grams) of Ice from one source of supply. Sometime in 2001, he began branching out and found numerous sources of supply. During that same time frame, he met William Salee. Flores began purchasing pound quantities (453.6 grams) of Ice for $13,000 to $14,000 per pound. Initially, his primary customers were Jeffrey Borho and Antonio Aguilar. He also supplied Mario Rodriguez and William Salee with Ice. Thereafter, Flores began dealing in 1 to 2 pounds (453.6 grams to 907.2 grams) of Ice and then 5 pounds (2.2 kilograms) of Ice. Flores estimated that the largest amount of Ice he had received at one time was 9 pounds (4 kilograms) and the largest amount of money he had paid to his suppliers at one time was $65,000. According to Flores, his largest customer was Jeffrey Borho. Flores also stated that after his (Flores's) second arrest, Jorge Salinas and Rufino DeLeon, and Salinas and Salee, started dealing directly with each other in the distribution of Ice, rather than going through him. Additionally, Flores indicated that after he stopped dealing with Salinas, he began obtaining Ice from Moises Lopez, whom had met through Christopher Almaguer. Initially, Flores obtained 1 to 2 pounds (453.6 to 907.2 grams) of

Ice from Lopez. Flores estimated he obtained a total of 5 to 6 pounds (12.2 to 2.7 kilograms) of Ice from Lopez.

64. On April 1, 2004, DEA Agents interviewed Francisco Flores at the Federal Medical Center in Fort Worth, Texas. During the interview, Flores indicated that one of his sources of supply was Jorge Salinas. According to Flores, he received 5 to 6 pounds (2.2 to 2.7 kilograms) of Ice a week from Salinas. Flores estimated that the largest single transaction he conducted with Salinas involved 2 to 3 pounds (907.2 grams to 1.3 kilograms). Additionally, Flores indicated that Amaya (one of his suppliers) kept large amounts of Ice and drug proceeds in a safe located at Chelsea Coffman's apartment. Flores stated that Amaya stored between 6 to 7 pounds (2.7 to 3.1 kilograms) of Ice at any given time and that Amaya distributed approximately 10 pounds (4.5 kilograms) of Ice per week.

65. On May 4, 6, and 10, 2004, DEA Agents interviewed Chelsea Coffman, who worked for Francisco Flores in the drug business. Coffman indicated that during 2003, Flores was routinely in possession of at least 1 pound (453.6 grams) of Ice at his residence. The most she had ever seen stored at Flores's residence was 5 pounds (2.2 kilograms) of Ice.

66. On May 26, 2004, DEA Agents again debriefed Francisco Flores. Flores stated that Jorge Salinas worked for one of his (Flores's) suppliers. Flores stated he negotiated the drug transactions with the supplier and then the supplier would send Salinas to transport the Ice to Flores. Salinas would also pick up drug proceeds from him (Flores) and return the proceeds to the supplier. Generally, Salinas delivered 5 pounds (2.2 kilograms) of Ice to Flores on the supplier's behalf for a price of $13,000 per pound.

67. On July 6, 2004, DEA Agents interviewed Jose Amaya. Amaya acknowledged he purchased 40 pounds (18 kilograms) of Ice from his source of supply every 2 weeks. He normally paid his source between $30,000 and $40,000 each day for the Ice. In all, Amaya estimated that over a 4 to 5-month period of time, he purchased several hundred pounds of Ice from his source of supply. Amaya, in turn, distributed the Ice to several customers, including Francisco Flores.

68. On October 6, 2004, DEA Agents interviewed Christopher Almaguer pursuant to a Proffer Agreement. Almaguer stated he became involved in the distribution of drugs when he was 16 years old. Regarding his recent drug activity, Almaguer identified Kenneth Brooks as his main Ice customer. Almaguer indicated he received multi-pound quantities of Ice from Moises Lopez. Almaguer met Lopez in early 2003. In an early meeting, Lopez advised Almaguer he could supply him with as much Ice as he could move. Lopez explained to Almaguer he received shipments of 50 to 100 pounds (22.6 to 45.2 kilograms) of Ice from his sources of supply in San Antonio, Texas, and California. Lopez initially sold Almaguer Ice for $10,000 a pound; however, he later set a price of $8,000 per pound. In the beginning, Lopez delivered 1 to 3 pounds (453.6 grams to 1.3 kilograms) of Ice to Almaguer at Grote's residence on a weekly basis. Almaguer generally dealt directly with Lopez. However, after Flores was arrested, Lopez, on occasion sent one of his drug runners to deliver the Ice. From March 2003 until shortly after Flores's arrest in February 2004, Lopez delivered 3 to 5 pounds (1.3 to 2.2 kilograms) of Ice "every week or two." Almaguer estimated the largest single shipment of Ice that Lopez fronted him totaled 5 pounds (2.2 kilograms).

69. During his debriefing, Almaguer acknowledged that after

Francisco Flores was arrested during the summer of 2003, he (Almaguer) began supplying Flores's customers with Ice. According to Almaguer, Flores had left a message on his cellular telephone instructing his customers to contact Almaguer in his absence. Almaguer estimated that from March 2003 until the summer of 2003, he (Almaguer) was receiving 3 to 5 pounds (1.3 to 2.2 kilograms) of Ice every 2 weeks. Almaguer identified William Salee as the person who was in charge of storing Flores's Ice at the main warehouse in Grand Prairie. According to Almaguer, Salee stored 2 to 3 pounds (907 grams to 1.3 kilograms) at any given time.

70. On November 12, 2004, William Salee interviewed with Federal agents pursuant to a Proffer Agreement. Salee explained to agents that he had met Francisco Flores in approximately early 2000, when Salee began purchasing "user amounts" of Ice from Flores. A short time later, Salee began introducing several persons, including Jeffrey Brevick, to Flores in order to "share a source" of Ice. According to Salee, the Glasshouse warehouse in Grand Prairie was used for "bikini shows" and the storage of Ice. Flores kept a safe in the warehouse and Salee observed Flores, Rufino DeLeon, Jeff Smith, and Priscilla Pena bring money and/or drugs to the warehouse. At times, Salee would set the bags of money on top of the safe when Flores was not around. After moving out of the Glasshouse, Flores and Salee moved to a warehouse on Skyway in Grand Prairie. The Skyway warehouse became the main place to store Ice and drug proceeds. Salee paid the rent at the warehouse and in return, Flores gave him Ice for his personal use

71. On December 4, 2004, agents reinterviewed Jose Amaya. During the interview, Amaya., stated he participated in Ice transactions with Moises Lopez for a 3 month period of time. Duringg that

time, Lopez delivered 10 to 15 pounds (4.5 to 6.7 kilograms) of Ice to Amaya.

72. On March 22, 2005, Kenneth Brooks was interviewed. Brooks stated that in September 2003, Christopher Almaguer introduced him to Francisco Flores and Moises Lopez. Initially, Brooks obtained Ice from Almaguer. However, after Almaguer was arrested, he began obtaining multi-pound quantities of Ice from Moises Lopez. At times, Lopez was accompanied by runners who assisted him in transporting and unloading the Ice. Initially, Brooks received 1 pound (453.6 grams) of Ice from Moises Lopez every couple of days. Then, he started receiving 2 pounds (907 grams) of Ice from Moises Lopez. By September 2003, Brooks was receiving 4 pounds (1.8 kilograms) of Ice from Lopez on a weekly basis. The largest shipment he ever received at one time from Lopez was 3 pounds (1.3 kilograms).

Lopez's Role in the Drug Conspiracy, Drug Quantities, and Other Guideline Issues

73. Pursuant to USSG § 1B1.3(a)(1)(A), the defendant is accountable for all acts and omissions he committed. Additionally, pursuant to USSG § 1B1.3(a)(1)(B), in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), the defendant is accountable for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction.

74. Moises Lopez was one of the major Ice suppliers to the Francisco Flores drug organization. From at least March 2003 through February 2004, Lopez distributed multi-pound quantities of Ice to Flores, as well as other conspiracy members, including

Christopher Almaguer and Kenneth Brooks. He also distributed Ice to other Ice suppliers, including Jose Amayma. During debriefing sessions with Government agents, Flores estimated he purchased a total of 5 to 6 pounds (2.2 to 2.7 kilograms) of Ice from Lopez. (See paragraph 63.) Mario Beltran told agents he witnessed one drug transaction between Lopez and Flores involving 1 pound (453.6 grams of Ice). (See paragraph 57.) Statements made by Brooks indicate he received 4 pounds (1.8 kilograms) of Ice from Lopez on a weekly basis. Brook's drug notes (which were seized on April 6, 2004) verify Brooks purchased at least 9 ½ pounds (4.3 kilograms) of Ice from Lopez. (See paragraphs 50 and 72.) Jose Amaya told agents he purchased 10 to 15 pounds (4.5 to 6.7 kilograms) of Ice from Lopez. (See paragraph 71.) Furthermore, Almaguer told agents that from March 2003 until shortly after Flores's arrest in February 2004 Lopez delivered,3 to 5 pounds (1.3 to 2.2 kilograms) of Ice "every week or two." Almaguer estimated the largest single shipment of Ice that Lopez fronted him totaled 5 pounds (2.2 kilograms). (See paragraph 68.)

75. Other than co-offender's statements and drug notes seized, officers also seized 455 net grams of methamphetamine with a purity of 41 percent (or 186 net grams of pure methamphetamine), along with 16,690 in U.S. currency from Lopez on July 17, 2003. (See paragraph 32 for details.)

76. The drug seizure, and the drug estimates relating to Lopez as provided to Government agents by Flores, Almaguer, Amaya, and Brooks (and verified through statements made by Mario Beltran and drug notes seized) far exceed the 1.5 kilograms of Ice necessary to invoke a base offense level of 38, which is the highest possible base offense level associated with the drug table found in USSG § 2D1.1.

77. Lopez maintained a buyer/seller relationship with Flores and his conspiracy members, thus he did not direct anyone within the Flores organization. However, statements made by Almaguer and Brooks indicate Lopez employed several runners who transported drugs on his behalf. Therefore, a leadership le is warranted. Regarding firearms, there is no evidence to suggest Lopez was ever armed during the commission of his drug activities.

78. Furthermore, according to DEA Agent Tim McAuliffe, the defendant debriefed with the Government; however, he was not truthful. Agent McAuliffe stated that of all the coconspirators who debriefed in this case, the defendant has been the least forthcoming.

Victim Impact

79. There is no victim of this offense other than society at large.

Adjustment for Obstruction of Justice

80. There is no evidence the defendant obstructed justice durinng the investigation or prosecution of this case.

Adjustment for Acceptance of Responsibility

81. During the Presentence Report interview, the defendant acknowledged that the facts set forth in the Factual Resume were correct. According to the defendant, he met Christopher Almaguer at a hair salon in Dallas. The defendant and Almaguer started talking about soccer and they developed a friendship. Three or four months after their initial meeting, Almaguer asked the defendant if he knew anyone who supplied drugs. At first, the defendant said no. After a while, Lopez started distributing

methamphetamine to Almaguer. Lopez only dealt directly with Francisco Flores on one occasion. The defendant estimated he sold Almaguer and/or Flores a total of 5 to 6 pounds (2.2 to 2.7 kilograms) of methamphetamine, generally a quarter pound per transaction.

82. The drug amounts provided by Lopez during the Presentence Report interview are in direct contrast to the evidence presented in the Offense Conduct which indicates Lopez delivered enormous amounts of Ice to various drug associates. It is clear the defendant is trying to minimize his involvement in the instant offense. He is also denying relevant conduct. Therefore, a reduction of acceptance of responsibility is not warranted in this case.

Offense Level Computations

83. The November 1, 2005, edition of the Guidelines Manual was used in this case.

84. Base Offense Level: The base offense level for a violation of 21 USC § 841(a)(1) is found in USSG § 2D1.1. Pursuant to USSG § 2D1.l(a)(3), the base offense level is determined by using the Drug Quantity Table set forth in Subsection (c). As indicated in paragraphs 74 though 76, the defendant is accountable for in excess of 1.5 kilograms of Ice. Pursuant to USSG § 2D1.1(c)(1), if the offense involved 1.5 kilograms of Ice or more, the base offense level is 38. **38**

85. Specific Offense Characteristic: None apply. **0**

86. Victim Related Adjustment: None. **0**

87. Adjustment for Role in the Offense: The defendant is considered a leader/organizer. Specifically, the defendant directed several individuals who acted as runners in his drug business. Since it is not known how many persons were involved in Lopez's drug business, a 2-level increase will be assessed pursuant to USSG § 3B1.1(c). **+2**

88. Adjustment for Obstruction of Justice: None. **0**

89. Adjustment for Acceptance of Responsibility: The defendant has not clearly demonstrated acceptance of responsibility for his offense. Therefore, no reduction is warranted pursuant to USSG § 3E1.1(a). **0**

90. Total Offense Level: **40**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

91. None.

Adult Criminal Convictions

92. None.

Criminal History Computation

93. The absence of any criminal convictions establishes a Criminal History Category of I. USSG Chapter 5, Part A.

Other Criminal Conduct

94. None.

Pending Charges

95. On July 17, 2003, the defendant was arrested by the Dallas, Texas, Police Department for Possession With Intent to Deliver a Controlled Substance. (See paragraph 32 for details.) The case, styled Case No. F-0353641, is currently pending in the 363rd Judicial District Court of Dallas County, Dallas, Texas.

Other Arrests

96. None.

PART C. OFFENDER CHARACTERISTICS

97. On October 18, 2005, this officer interviewed the defendant, in the presence of his attorney, at the Federal Correctional Institution in Seagoville, Texas. Since the defendant spoke only limited English, a Spanish speaking interpreter was used. During the interview, the defendant was cooperative and provided personal and family information needed to complete the Presentence Report. On November 10, 2005, this officer attempted a home visit with the defendant's mother at her residence, 235 West Pembroke, Dallas, Texas. However, the attempt was unsuccessful.

Personal and Family Data

98. Moises Lopez was born on September 1, 1973, in Luvianos, Mexico, to the union of Moises Lopez and Sirenia Navarro. The defendant's father died when he was 2 weeks old. Thereafter, the defendant's mother relocated to the United States and settled in Dallas, Texas, for employment opportunities. The defendant remained in Mexico and was reared by his maternal grandparents, Felix Navarro-Osorio and Delfina Calderon. The defendant's

grandparents operated a popcorn stand in order to support the family. The defendant's mother also sent money to her parents to supplement their income.

99. When the defendant was 10 years old, he got a job shining shoes in order to earn money. In January 1989, when the defendant was 16 years old, he entered the United States to live with his mother in Dallas. His mother resided with her common-law husband, Eriberto Puebla, at 235 West Pembrook. The defendant's mother's three children with Eriberto (Diana, Thalia, and Jennifer), also resided at the family home.

100. The defendant's family continues to reside at the family home on West Pembrook. For the past 30 years, the defendant's mother has worked as a saw operator for Pilgrim's Pride. His stepfather was employed as a truck driver; however, he has since retired. The defendant's oldest sister, Diana, works full-time in a doctor's clinic in Dallas. His two younger sisters, Thalia and Jennifer, attend school.

101. The defendant's surviving family members are identified as follows:

Name	Relation	Age	Residence
Sirenia Navarro	Mother	54	235 West Pembroke Dallas, Texas
Diana Navarro	Half sister	20	235 West Pembroke Dallas, Texas
Thalia Navarro	Half sister	12	235 West Pembroke Dallas, Texas
Jennifer Navarro	Half sister	7	235 West Pembroke

102. For the past 10 years, the defendant has maintained a common-law relationship with Letricia Hernandez. The couple have two children: Edgar, age 10; and, Isaac, age 2. Letricia and the children reside at 2418 Searcy Drive in Dallas, Texas. Letricia, age 27, does not have a criminal record. She works in a medical clinic in Dallas.

Physical Condition

103. The defendant is 5 feet 5 inches tall, and weighs 155 pounds. He has brown eyes and black hair. The defendant does not have any scars or tattoos.

104. The defendant reported he is in good health and not under the care of a physician. According to the defendant, he has never been hospitalized or undergone any surgeries.

Mental and Emotional Health

105. The defendant reported he has never suffered from any mental or emotional problems.

Substance Abuse

106. The defendant reported he experimented with powder cocaine on approximately two or three occasions in 2000. Other than that, the defendant reported he has never used any illegal drugs. Regarding alcohol consumption, the defendant acknowledged he began drinking beer at the age of 17. By the time the defendant was 25 years old, he was drinking "quite a bit" of beer on a daily basis. The defendant estimated he drank six cans of beer per day for 1 year. When he

realized it was interfering g with other aspects of his life, he quit drinking to excess.

Educational and Vocational Skills

107. According to transcripts from the Dallas Independent School District, the defendant entered the ninth grade at W.H. Adamson High School in 1989. He withdrew from classes prior to completing the school year.

108. The defendant can read and write in Spanish. He can speak limited English, and he can read and write in English on a very limited basis.

Employment Record

109. Employment records indicate the defendant worked for Tecate Disco, Dallas, Texas, from January 2003 until January 20, 2005. The defendant was employed as a bartender and earned $500 a week plus tips.

110. The defendant reported he worked for the U.S. Postal Service in Dallas, Texas, for a 9-month time period in 2002. The defendant worked the nighht shift sorting mail. A written verification request was sent to the U.S. Postal Service. However, as of the disclosure of the Presentence Report, the agency had not responded to the request for information.

111. The defendant reported he owned and operated El Noa Bar, Dallas, Texas, from 2000 through 2001.

112. According to the defendant, he worked for Texwood Industries, Duncanville, Texas, during 2000 and 2001. The defendant reported

he assembled furniture and earned $400 per week. A written verification was sent to Texwood Industries. However, as of the disclosure of the Presentence Report, the company had not responded to the request for information.

113. The defendant reported he worked for Highland Fire Protection, Garland, Texas, during a 9-month period of time in 1999. The defendant installed sprinkler systems and earned $500 per week. A written verification was sent to Highland Fire Protection. However, as of the disclosure of the Presentence Report, the company had not responded to the request for information.

114. Employment records from Pilgrims Pride, located in Dallas, Texas, reveal that from April 28, 1994, until May 18, 1996, the defendant worked as a warehouse laborer. He earned $6.85 per hour. On May 18, 1996, the defendant resigned his position.

115. According to employment records, the defendant worked for Austin Bridge and Road, Inc., Dallas, Texas, from October 23, 1992, through April 22, 1994. He was employed as a laborer and earned $7 per hour.

Financial Condition: Ability to Pay

116. The defendant provided a Personal Financial Statement dated October 18, 2005. Additionally, this officer obtained a copy of the defendant's credit report. The defendant's financial statement and credit report revealed the following:

Assets

Cash

Bank of America - checking account	$300.00

Unencumbered Assets

Home furnishings	$5,000.00

Equity in Other Assets

Personal residence - 2418 Searcy Drive Dallas, Texas	$5,000.00
1992 Nissan Maxima	4,000.00
TOTAL ASSETS	**$14,300.00**

Unsecured Debts

No personal debt	$0.00
TOTAL UNSECURED DEBTS	$0.00
NET WORTH	**$14,300.00**

Analysis

117. The defendant has been in custody since January 2005. He is being represented by a Court-appointed attorney. The defendant does not have any present income or monthly expenditures.

118. In 1999, the defendant and his common-law wife purchased a personal residence located at 2418 Searcy in Dallas, Texas. The purchase price of the house was $70,000, with monthly payments of $710. The mortgage loan (which is through Countrywide Mortgage) is in the defendant's wife's name. In 2000, the couple took out a

$20,000 equity loan on the house. Other than their personal residence, the couple's assets consist of personal possessions, a modest checking account, and a 13-year old car. Regarding debts, the defendant's credit report reveals he has a credit account with Bank of America in the amount of $774. The account is in charged off status. The defendant also has a Citibank credit account in the amount of $1,003, which is in collection status.

119. Based on the defendant's current financial status, the lengthy prison sentence he is facing, and his deportation status, it does not appear he has the ability to pay a fine.

PART D. SENTENCING OPTIONS

Custody

120. Statutory Provisions: The term of imprisonment for a violation of 21 USC § 841(a)(1) & (b)(1)(A) is not less than 10 years or more than Life.

121. Guideline Provisions: Based on a Criminal History Category of I and a Total Offense Level of 40 the Guideline Range of Imprisonment is 292 to 365 months, which is in Zone D of the Sentencing Table. The minimum term shall be satisfied by a sentence of imprisonment. USSG § 5C1.1(f).

Impact of Plea Agreement

122. The defendant was originally named in Counts 1 and 3 of the Indictment, which charged him with Conspiracy to Possess With Intent to Distribute More Than 50 Grams of Methamphetamine and Possession With Intent to Distribute More Than 50 Grams of Methamphetamine. The defendant ultimately pleaded guilty to Count

3. Since Count 3 carries a maximum term of Life imprisonment, the defendant has not reduced his maximum statutory term of imprisonment. Additionally, all relevant conduct has been taken into account in the calculation of the advisory guidelines. Therefore, the Plea Agreement has not compromised the advisory guidelines.

Supervised Release

123. Statutory Provisions: The Court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the Court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute. The authorized term of supervised release for a violation of 21 USC § 841(a)(1) & (b)(1)(A) is not less than 5 years.

124. The Protect Act, which was enacted April 30, 2003, changed the resentencing options available upon revocation of a term of supervised release. For offenses occurring after April 30, 2003, 18 USC § 3583(h) was modified as follows:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment: The length of such tern of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

125. Guideline Provisions: USSG § 5D1.1 provides that the Court shall order a teem of supervised release to follow imprisonment

when a sentence of imprisonment of more than 1 year is imposed, or when required by statute. Since the authorized term of supervised release for a violation of 21 USC § 841(a)(1) & (b)(1)(A) is not less than 5 years, the guideline range is 5 years.

Eligibility for Deportation

126. The defendant is a citizen of Mexico. He illegally entered the United States in 1989. According to immigration officials, the defendant has no legal status in the United States. The defendant is deportable from the United States under 8 USC § 1227.

Probation

127. Statutory Provisions: The defendant is not eligible for probation by statute. 21 USC § 841(a)(1) & (b)(1)(A).

128. Guideline Provisions: The defendant is not eligible for probation because the offense of conviction expressly precludes probation as a sentence. USSG § 5B1.1(b)(1).

Restitution

129. Statutory Provisions: 18 USC § 3663(c) authorizes the Court to impose community restitution in accordance with 18 USC §§ 3663 & 3664 for violations of the Controlled Substances Act in which there is no identifiable victim. An order of restitution shall be based on the amount of public harm caused by the offense, as determined by the Court, and shall be distributed in accordance with the statute. The amount of restitution ordered shall not exceed the amount of the fine ordered.

130. Guideline Provisions: In a case where there is no identifiable

victim and the defendant is convicted under 21 USC § 841, 844(a), 849, 856, 861, or 863, the Court, taking into consideration the amount of public harm caused by the offense and other relevant factors, may order an amount of community restitution not to exceed the fine imposed under USSG § 5E1.2. USSG § 5E1.1(d).

In accordance with the Mandatory Victim Restitution Act of 1996, any community restitution ordered will be split between the following State agencies:

Executive Director
Criminal Justice Division
Office of the Governor
P.O. Box 12428
Austin, Texas 78701
cc: Director of Justice Programs
(65 percent)

Executive Director
Texas Commission on Alcohol and Drug Abuse
9001 North IH 35, Suite 105
Austin, Texas 78753-5233
(35 percent)

Fines

131. Statutory Provisions: The statutory maximum fine that may be imposed is $4,000,000. 21 USC § 1(a)(1) & (b)(1)(A). The defendant shall pay interest on any fine of more than $2,500 unless the fine is paid in full before the 15th day after the date of judgment. If the Court determines that the defendant does not have the ability to pay interest on a fine that may be imposed, the Court may waive the requirement for interest. 18 USC § 3612(f).

132. A special assessment of $100 is mandatory. 18 USC § 3013(a). As of the disclosure of the Presentence Report, the special assessment had not been paid.

133. Guideline Provisions: The fine range is $25,000 to $4,000,000. USSG § 5E1.2(c)(3) & (4).

134. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release ordered, unless the Court finds it is clearly unreasonable to do so. USSG § 5E1.2(d)(7). The most recent advisory from the Administrative Office of the U.S. Courts dated April 15, 2005, reflects the average per capita costs in Federal Bureau of Prisons operated facilities during 2004:

Federal Prison Facilities	Community Corrections Centers
Daily: $63.57	Daily: $55.07
Monthly: $1,933.80	Monthly: $1,675.23
Annually: $23,205.59	Annually: $20,102.75

The Budget Division of the Administrative Office of the U.S. Courts provides the following per capita supervision costs:

Supervision
Daily:$9.46
Monthly:$287.73
Annually:$3,452.72

Supervision costs include the costs for drug/alcohol treatment and testing, mental health treatment, or the costs associated with

electronic monitoring.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

135. At this time, there are no known mitigating or aggravating factors that warrant a departure from the prescribed guideline range.

Respectfully Submitted

/s/_____
Terri L. Lassiter
Senior U.S. Probation Officer

TLL
Date: November 22, 2005

APPROVED:

/s/_____
Candace L. Story
Supervising U.S. Probation Officer

APPENDIX VII

STATUTES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a

prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.
(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100

or more marijuana plants regardless of weight; or
(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment.

Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein. (C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph

shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the

defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2

years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the

provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;
(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or
(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;
shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.
(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.
(3) For the purposes of this subsection, the term "boobytrap"

means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal

sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted

by other heath professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

21 U.S.C. § 846:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.